88-1139

No. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CERTIFIED REGISTERED NURSE ANESTHETISTS OF ANESTHESIA GROUP PRACTICE, RONALD W. ERB, KATHLEEN ERB, JOANN JOHNSON BLAKE, DAVID R. PAUL, SUSAN PAUL, JUDIE SCLAFANI, and JERRY ZOELLER

Petitioners

vs.

ANESTHESIA GROUP PRACTICE, INC., CLAYTON L. SCROGGINS & ASSOCIATES, JOSEPH M. CASPER, M.D., JOSEPH POSSERT, M.D., RICHARD ROHRER, M.D., WILLIAM DALTON, M.D., ASHVIN ZUMKHWALA, M.D., ANDRES BELUAN, M.D., and LITO ALINO, M.D.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO HAMILTON COUNTY

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64 pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the pre-emption clause of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1144(a), bar state law claims in state court directly against an employer, its managing owners and accountant, for breach of the employer's contractual obligations to fund retirement plan accounts at a promised rate as part of the compensation earned by employees who have performed work under the contract?

2. May employees enforce in a state court, under federal common law or ERISA, an employment contract promise of an employer to fund employee retirement accounts, where the ERISA plan description documents unilaterally prepared by the employer are generally consistent with, but do not specifically recite, the intent of the plan to honor the funding level promised?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

CERTIFIED REGISTERED NURSE ANESTHETISTS OF ANESTHESIA GROUP PRACTICE
SUSAN DOLPH
RONALD W. ERB
KATHLEEN ERB
RICHARD L. EVERETT
LINDA FEIN
JOANN JOHNSON BLAKE
DAVID R. PAUL
SUSAN PAUL
JUDIE SCLAFANI
JERRY ZOELLER

Plaintiffs-appellants

ANESTHESIA GROUP PRACTICE, INC.
CLAYTON L. SCROGGINS & ASSOCIATES
JOSEPH M. CASPER, M.D.
JOSEPH POSSERT, M.D.
RICHARD ROHRER, M.D.
WILLIAM DALTON, M.D.
ASHVIN ZUMKHWALA, M.D.
ANDRES BELUAN, M.D.
LITO ALINO, M.D.

Defendants-appellants

The plaintiffs-appellants Dolph, Everett, and Fein, represented below by counsel for petitioners here, no longer have an interest in the outcome of this petition. Accordingly, they have not been listed in this petition. All other parties have been identified in the caption.

The petitioner-plaintiff-appellant identified as Certified Registered Nurse Anesthetists of Anesthesia Group Practice is not a corporation but is an association originally consisting of twenty of the twenty-one nurse employees of defendants to pursue their rights in this controversy.

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IN THE

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OCTOBER TERM, 1988

No. _____

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO HAMILTON COUNTY

This petition seeks review of a decision of the Court of Appeals of Ohio, Hamilton County, reported at ____ Ohio App. ____, 1988 Ohio App. LEXIS 2874, motion to certify denied, 39 Ohio St. 3d 712 (No. 88-1485), rehearing denied, 39 Ohio St. 3d 731.

The decision of the Court of Appeals is reproduced at appendix, p. 1a. The memorandum of decision of the trial court below is reproduced at appendix, p. 7a.

JURISDICTION

The judgment sought to be reviewed was entered by the Court of Appeals of Ohio, Hamilton County, on June 29, 1988 [judgment entry, appendix, p. 14a].

A motion to certify (Notice of Appeal) to the Supreme Court of Ohio was timely filed with the Court of Appeals on July 28, 1988, and with the Supreme Court of Ohio on August 22, 1988, in accordance with the rules of that Court.

The motion to certify was denied by the Supreme Court of Ohio on October 12, 1988 [entry, appendix, p. 16a].

A motion for rehearing of the motion to certify was filed with the Supreme Court of Ohio and was denied on November 23, 1988 [rehearing entry, appendix, p. 17a].

This petition is filed within 90 days of October 12, 1988, the date of the entry denying the original motion to certify.

This Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S.C. Section 1257(3).

STATUTES INVOLVED

29 U.S.C.S. § 1002. Definitions

For purposes of this title:

* * *

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" mean any plan, fund, or program which was heretofore or is hereafter estabished or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond.

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

* * *

(3) The term "employee benefit plan" or "plan" means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan.

* * *

(34) The term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

* * *

29 U.S.C. § 1024. Filing and furnishing of information

(a) Filing of annual report, plan description, summary plan description, and modifications and changes with Secretary.

(1) The administrator of any employee benefit plan subject to this part shall file with the Secretary—

* * *

(B) the plan description within 120 days after such plan becomes subject to this part and an updated plan description, no more frequently than once every 5 years, as the Secretary may require;

29 U.S.C. § 1132. Civil enforcement

(a) Persons empowered to bring a civil action. A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

* * *

(e) **Jurisdiction.** (1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

* * *

29 U.S.C. § 1144(a)

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supercede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b).

* * *

(c) **Definitions.** For purposes of this section:

(1) The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State. A law of the United States applicable only to the District of Columbia shall be treated as a State law rather than a law of the United States.

(2) The term "State" includes a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this title.

* * *

Ohio Revised Code, Section 2305.01:

The court of common pleas has original jurisdiction in all civil cases where the sum or matter in dispute exceeds the exclusive original jurisdiction of county courts and appellate jurisdiction from the decisions of boards of county commissioners.

* * *

STATEMENT OF THE CASE

Petitioners were nurse employees of Respondent Anesthesia Group Practice, Inc., ("AGP") who seek to enforce an employment contract provision by which AGP obligated itself to include in the compensation of each employee, a contribution to the employee's separate retirement account. The employees contended that the mutually manifested intent of the parties to the employment contract was that the contributions would be made by the employer at the level of 25% of the employee's gross salary. Not until after the employees had worked and the contributions had been earned, did the employer manifest any change in intention to contribute at the promised funding level.

AGP had maintained an "individual account plan" within the definition of 29 U.S.C. Section 1002(34) of the Employment Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1001 *et seq.* Petitioners were vested participants in the plan. A written "plan description" as referred to in 29 U.S.C. Section 1024(a)(1)(B) was prepared by AGP. Its provisions were not inconsistent with the promised funding level of the employment contract, reciting no specific aggregate amount, and no formula in its profit-sharing portion.

AGP's plan description stated that "the Employer shall contribute [to the profit sharing portion of the retirement plan] . . . such amount . . . as shall be determined prior to the end of the Fiscal Year by the Board of Directors." [Motion for summary judgment, exhibit A2.] The pension portion of the plan description contained a funding formula of "5% of compensation not in excess of the benefit and contribution base in effect under the Social Security Act and 12% of compensation in excess of such base." [Motion for summary judgment, exhibit A1.] These provisions are more fully reproduced in the decision of the Court of Appeals at appendix, pp. 3a, n.2 and 4a, n.3.

The forms of the contractual agreements were both written and oral and included: (1) oral statements made at the hiring

interviews that compensation would include a contribution to a retirement plan equal to 25% of regular pay, (2) written job offers promising a "Pension Plan at 10% with a four year vesting" and "Profit Sharing Plan at 15% beginning with the third year of employment," and (3) consistent reaffirmations of the promise when pay raises and bonuses were announced, such as: "The Board has once again voted to issue a year-end bonus to each full-time person. This year, this will be in the amount of $1,500 with salary increases of $2,000 per year. This is in addition to the 25% allotted to the Pension and Profit Sharing Plan, and comes to a package increase of $4,375." [Affidavit with exhibits opposing motion for summary judgment.]

AGP made the contributions at the promised level for a number of years and then reduced the payments while continuing to reaffirm the employment contract promise to pay 25% for each employee to the retirement plan. When the reduced funding was discovered, AGP first denied that the funding level had been reduced below 25%, but then in a meeting on March 16, 1985, admitted the underfunding, refused to restore the deficiencies, and declared for the first time its intention to fund at a lower level in the future.

The plaintiff-employees sued the employer AGP, its owners and accountant in Common Pleas Court of Ohio, Hamilton County, which has general jurisdiction under Ohio Revised Code, Section 2305.01. They asserted claims under Ohio contract and trust law, and in addition or in the alternative, under the Employment Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* The bank which was the administrator of the plan has not been joined as a party. [Complaint, appendix, p. 18a.]

Federal Question Raised:

By amended answer filed near the close of discovery, defendants added as their fifth defense the following: "82. The claims stated in Plaintiffs' Complaint are pre-empted by federal law." [Defendants' amended answer to complaint.]

Defendants thereafter moved for summary judgment on the federal pre-emption issue on the grounds that "the claims stated in Plaintiff's Complaint are preempted under the clear wording of the Employees Retirement Income Security Act of 1974 ("ERISA")." [Motion for summary judgment, appendix, p. 35a] Defendants argued that 29 U.S.C. Section 1144(a) pre-empted, *in toto*, the claims stated in plaintiff's complaint, requiring summary judgment in the favor of defendants.

The trial court granted summary judgment to defendants, holding that the employees' claims were pre-empted by the pre-emption clause of ERISA, 29 U.S.C. Section 1144(a) and relying in part upon the authority of this Court's decision in *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1 (1987).

The employees appealed to the Court of Appeals of Ohio, Hamilton County, presenting the issue that ERISA did not pre-empt their claims and urging that (1) direct contract claims against the employer for contributions to a retirement plan are not pre-empted by ERISA, (2) if pre-empted, the claims are enforceable in state court under ERISA pursuant to 29 U.S.C. Section 1132(a)(1)(B) and (e), and (3) failure by the employer to include terms of the employment contract in the ERISA plan description should not enable the employer to circumvent otherwise enforceable obligations. [Brief of plaintiffs-appellants, assignment of error, etc., appendix, p. 37a.]

The Court of Appeals, relying in part on the 4-3 decision of the Supreme Court of Ohio in *Richland Hospital, Inc.* v. *Ralyon*, 33 Ohio St. 3d 87 (1987), affirmed, holding that (1) misrepresentation and breach-of-contract claims are claims "in connection with employee-benefit plans, and those claims are preempted insofar as they are grounded in the common law of Ohio," (2) "ERISA claims against AGP's owners, board of directors or [accountants] . . . insofar as they are based on breach of fiduciary duty" are within the exclusive jurisdiction of federal courts, and (3) that the employees' breach-of-contract claim was not "congnizable under the federal common law of ERISA."

The court equated "the plan" defined in 29 U.S.C. § 1002(3) with the written "plan description" of 29 U.S.C. 1024(a)(1)(B). The court recognized that "federal law is in conflict," concluding that "the better view" precluded enforcement of the contract which was not specifically recited in "the plan."

Plaintiffs sought review in the Supreme Court of Ohio asking that its decision in *Richland Hospital, Inc.* v. *Ralyon*, 33 Ohio St. 3d 87 (1987), be limited and the decision of the Court of Appeals holding their common law claims pre-empted be reversed, citing among their authority *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, (1987) and *Murphy* v. *Heppenstall Co.*, 635 F.2d 233, (3rd Cir. 1980).

Plaintiffs also urged in the Supreme Court of Ohio that the contract promises of the employer, if pre-empted when based on state law, were enforceable under federal law, even if omitted by the employer from the employer's plan description documents, citing *Donovan* v. *Dillingham*, 668 F.2d 1367, (11th Cir. 1982, *en banc*) and *Northwest Administrators, Inc.* v. *B.V. & B.R., Inc.*, 813 F.2d 223, (9th Cir. 1987). [Memorandum in support of jurisdiction, proposed propositions of law, appendix, p. 39a.]

The Supreme Court of Ohio denied petitioners' motion to certify, 4 to 3, and denied a motion for rehearing, 4 to 3 (Moyer, C.J., Locher and Holmes dissenting from the denial of the motion to certify; Moyer, C.J., Locher and Douglas dissenting form the denial of the motion for rehearing).

REASONS TO ALLOW WRIT

The primary issue in this petition is whether an employment contract otherwise enforceable under state law and which includes an obligation undertaken by an employer to compensate employees in part with a specific contribution to the employees' individual plan accounts is enforceable under state or federal law.

The courts of Ohio below have held that Ohio contract law under which the contract would be enforceable is pre-empted by the Employment Retirement Security Act of 1974, ("ERISA"), specifically, 29 U.S.C. Section 1144(a).

Petitioners assert that ERISA was not intended to pre-empt the application of the general contract laws of the states to enforce an employment contract directly against the employer. To do so would make into a federal matter, for civil enforcement purposes, not only employee benefit plans, but employment contracts under which retirement or welfare benefits or contributions are to be part of the employees' compensation. That would be the case even where, as here, ERISA provides no regulation of subject matter of any contract provision at issue.

ERISA, as presently enacted, does not apply to obligations to contribute to profit sharing plans, or to contribute to pension plans above a minimum level.[1]

The holding of the Court of Appeals of Ohio is an erroneous interpretation of ERISA's pre-emptive scope, and is in direct conflict with decisions of other courts including federal courts of appeals of the Third, Ninth and Eleventh Circuits and courts of New York and California.

---

[1] The "minimum funding requirements" of ERISA "are not to apply to profit sharing . . . plans." "Of course, contributions generally may be greater than these minimum requirements." "For money purchase pension plans, the minimum amount that an employer is to annually contribute to the plan generally is the amount that must be contributed for the year under the plan formula." House Report No. 93-533, U.S. Cong. & Admin. News, p. 5064.

A secondary issue in this petition is whether an employment contract provision to establish or specifically fund a retirement plan is unenforceable under federal law, as the state Court of Appeals held, where the employer does not include the contract terms at issue in the ERISA plan description in accordance with the intent of the parties.

Petitioners submit that ERISA regulates plans, plan assets, transactions with the plan trust, and the conduct of plan fiduciaries. By breaching the employment contract, the promised contributions to the individual plan accounts did not become plan assets in the hands of the plan trustees. The employer did not recite its specific promises in the written plan description for reporting under ERISA. Petitioners' direct claim against the employer does not, therefore, touch the regulated plan. By holding such claims pre-empted or not otherwise cognizable, the Court of Appeals of Ohio concluded that Congress pre-empted an important and fundamental state law of general application and left a void in its place, thereby causing the very harm ERISA was enacted to prevent. This holding of the Ohio court also conflicts with decisions of federal courts of appeals.

Petitioners further submit that if Congress had intended compensation terms of the employment contract to be regulated by ERISA, it would be the obligation of the employer to include those contract provisions in the plan description to be enforced by the plan administrators under the trust agreement. An employer's failure to meet ERISA's reporting standards does not insulate the employer from the obligations which its compliance would have imposed.

The plan description is a document prepared by the plan administrator after the year to which it relates, and then is updated "no more frequently than once every 5 years" thereafter. 29 U.S.C. Section 1024(a)(1)(B). Under the common law of Ohio, a document which is unilaterally prepared by one party after performance by the other cannot be the source of the obligations under a contract. Under common law of Ohio, where a contract does not specify a term setting

an amount to be paid, the court may look to surrounding circumstances to apply the missing terms. Such principles are consistent with federal common law. The Court of Appeals of Ohio has erroneously stated federal common law.

This Court has not decided the extent of ERISA's impact upon direct contract claims against the employer which do not effect the regulated subject matter of an ERISA plan. By settling this issue in this case, much federal litigation over ERISA pre-emption will be reduced. Decisions of federal courts of appeals, of state courts and of this court are consistent with or affirmatively support the propositions urged by the petitioners here.

In *Murphy* v. *Heppenstall Co.*, 635 F.2d 233 (3rd Cir. 1980), the Third Circuit permitted sixteen employees to recover, directly from the employer, pension benefits promised in excess of the amount provided in the employer's insured ERISA plan, rejecting the employer's pre-emption defense to hold that ERISA "does not pre-empt direct employer liability under a pension agreement." 635 F.2d at 237. "One of Congress' central purposes in enacting this complex legislation was to prevent the 'great personal tragedy' suffered by employees whose vested benefits are not paid * * * 'owing to the inadequacy of current minimum standards' [whereby] funds to pay promised benefits may be endangered." 635 F.2d at 238. "Congress wanted to correct this condition by making sure that if a worker has been promised a defined pension benefit upon retirement — and if he has fulfilled whatever conditions are required to obtain a vested benefit — that he will actually receive it." 635 F.2d at 239.

Courts of California have upheld a law of that state for the recovery of delinquent retirement plan contributions, holding that state created liens on the employer's property to secure the contributions were not subject to pre-emption by ERISA. In *Carpenters Health & Welfare Trust Fund for California* v. *Parnas Corporation*, 176 Cal.App.3d 1196 (1 Dist. 1986), a "contractor was obligated under a collective bargaining

agreement to, *but did not*, make specified payments to the Funds for fringe benefits of the individual carpenters employed by him. Such payments, when made," said the court, "are in effect part of the carpenter's total wage package, which part is credited to him on the books of the Funds. '[T]hese contributions are in substance as much "justly due" to the employees who have earned them as are the wages payable directly to them in cash.' [*Emphasis, the court's.*]" 176 Cal.App.3d 1196, 222 Cal.Rptr. at 670.

In contrast, the Ohio Court of Appeals below stated that, "[w]hile the result may appear harsh in this case, one of the central goals (if not the central goal) of ERISA is to protect the interests of employees and their beneficiaries in employee-benefit plans." [Decision, p. 7, App. p. 3a.] The Court of Appeals then denied the employees the rights ERISA was enacted to protect.

The Court of Appeals of New York has rejected an ERISA pre-emption challenge to uphold a law which did not conflict with, but supplemented, ERISA by allowing employees to recover from the employer's shareholders delinquent contributions to a retirement fund. *Sasso* v. *Varchris*, 66 N.Y.2d 28, (1986). The court noted that the statute itself purports to impose only "minimum standards." The court reasoned that ERISA provides no express provisions to recover delinquent contributions, only equitable relief to enforce the statute. Other remedies, thus, were not pre-empted and, under ERISA, delinquent contributions were enforced by an action founded either on *state law*, the collective bargaining agreement between the parties or the trust agreement.

In *Cornell Mfg. Co., Inc.* v. *Mushlin*, 70 App.Div.2d 123, (1979), a New York court held that ERISA was not meant "to shield such misconduct from State law especially where, as here, no interest protected by the Act is involved." 420 N.Y.S.2d 231, at 235. The Court noted that plaintiff had not brought suit against the defendants as former pension plan trustees.

The notion that ERISA operates to pre-empt state laws without filling the resulting void with a means to achieve the statutory goal is in conflict with decisions of federal courts of appeals. "As the language makes clear, federal exclusivity is a corollary of regulatory coverage, not an independent statutory goal." *California Hospital Association* v. *Henning*, 770 F.2d 856, 859 (9th Cir. 1985). The purpose of ERISA's pre-emption is to protect employers from "the burden of conflicting state regulation of pension and welfare plans." 770 F.2d 856 at 861.

This Court has since held that relief under state law in the form of a lump-sum payment to the employees would not conflict with any regulation under ERISA and would, accordingly, not be pre-empted. "Congress intended pre-emption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations. This concern only arises, however, with respect to benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation." *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1 (1987).

In *Fort Halifax* this Court cited the Ninth Circuit's decision in *Martori Bros. Distributors* v. *James-Massengale*, 781 F.2d 1349, (9th Cir. 1986), amending 791 F.2d 799, cert. denied 479 U.S. 949 and 1018 (1986). In *Martori*, the Ninth Circuit upheld an administrative order under California law directing employers to make lump sum payments directly to the employees. The payments included compensation for welfare plan and pension benefits which employees would have received, but did not receive, because of the employers' violation of California's labor laws in negotiating the employment contract. The Ninth Circuit had similarly concluded in *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, (9th Cir. 1985), that damages awarded for injuries suffered due to wrongful exclusion from an ERISA plan were not "benefits" under an ERISA plan and not pre-empted by ERISA.

"ERISA's pre-emption of 'State Law' is only of such laws as

regulate the *'terms and conditions'* of employer benefit plans." [*Emphasis, the court's.*] *Carpenters Health & Welfare Trust Fund for California* v. *Parnas Corporation*, 222 Cal.Rptr. 668, 671, (Cal.App. 1 Dist. 1986), citing *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 n. 17 (1983). Where the remedy under state law did not "regulate the terms and conditions of employee benefit plans," the California court reasoned, the state claim was not pre-empted by ERISA. "The test" is "whether both regulations can be enforced without impairing the federal superintendence of the field." 222 Cal.Rptr. at 672.

The Ohio Court of Appeals here relied on a misapplication of the decision of the Eleventh Circuit in *Nachwalter* v. *Christie*, 805 F.2d 956 (11th Cir. 1986), for the proposition that a plan as reported in the plan description could not be "modified" (or supplemented) by resort to an agreement which was oral (or written but informal). But in *Nachwalter* the claimant's decedent had agreed to the plan terms which precluded informal changes, and the informal agreement in fact conflicted with the terms of the instrument which bound the plan trustees who were parties to the action. At issue was the amount of the pension *benefit* to be paid *by* the plan trustees *from* plan assets to the detriment of other beneficiaries. The extension of *Nachwalter* by the court below conflicts with another decision of the Eleventh Circuit.

The twelve judges of the Eleventh Circuit (including two participating in the *Nachwalter* decision) agreed unanimously that the "plan" preceeds the documentation, and that the employer's duties under the plan do not flow from the plan documents which the employer or plan administrator is required to prepare. "[I]t would be incongruous for persons establishing or maintaining informal or unwritten employee benefit plans, or assuming the responsibility of safeguarding plan assets, to circumvent the Act merely because an administrator or other fiduciary failed to satisfy reporting or fiduciary standards. Accord, *Dependahl* v. *Falstaff Brewing*

Corp., 491 F.Supp. 1188, 1195, (E.D. Mo. 1980) aff'd, 653 F.2d 1208 (8th Cir. 1981)." *Donovan* v. *Dillingham*, 688 F.2d 1367, 1372, (11th Cir. 1982, *en banc*).

In *Donovan*, the Eleventh Circuit stated that "in determining whether a plan, fund or program (pursuant to a writing or not) is a reality a court must determine whether from the *surrounding circumstances* a reasonable person could ascertain the *intended* benefits, beneficiaries, source of financing and procedures for receiving benefits." [*Emphasis added.*] *Donovan* v. *Dillingham*, 688 F.2d 1367, 1373, (11th Cir. 1982, *en banc*).

The Ninth Circuit also has held that, where pension plan documents are unclear, evidence of the circumstances is relevant in determining the intentions of the parties when interpreting an ERISA plan. In the case of *Northwest Administrators, Inc.* v. *B.V. & B.R., Inc.*, 813 F.2d 223, (9th cir. 1987), the Court held that proof of the intent of the parties regarding the classes of employees for whom contributions to the plan must be made was permissible to explain and complete the written plan documents in accordance with the terms of the contract. "Although ERISA contains numerous requirements that a plan must adhere to — a written instrument, named fiduciaries, public reports, etc. [citations omitted] — these requirements are not part of the definition of 'plan'." *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1503, (9th Cir. 1985). "We stated that '[o]nce established, ERISA operates to protect an employee's interest in the welfare benefit program regardless of whether the employer complies with the administrative and reporting requirements detailed under ERISA." *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499, 1503 (9th Cir. 1985).

The decision of the Ohio Court of Appeals here leaves employees in a vulnerable position, providing employers with the opportunity to promise employees compensation in the form of retirement plan contributions and then totally escape their obligations to keep their promises. The Ohio court

below has sanctioned a procedure which can be followed by all employers in its jurisdiction.

No employee presented with a plan description to compare with the promises from the employer could ever come to the conclusion that the promises were unenforceable. The employer, however, advised by its lawyer specializing in employment law and aware of the decision below, would know that it could make the promises, extract the performance of its employees, and then renege on its promises. The employee who has worked in expectation of retirement income will be denied that security, and the injustice which Congress expected to prevent in enacting ERISA will have been facilitated by the Ohio court's interpretation of federal law.

The decision of the Court of Appeals of Ohio, unless reversed, will be a blueprint for fraud which will defeat the goals and undermine the protections which both federal and state law have been developed to prevent.

The pre-emption clause of the Employees Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. Section 1144(a), is evolving as a shield used by employers almost routinely to escape civil liability from all forms of obligations. The number of reported cases citing to recent decisions of this Court attest to activity in this area. The case here is one in which the most fundamental employer obligation, to pay promised compensation to the employee after the employee has worked, has been removed from the realm of Ohio contract law.

The questions here are important and should be settled by this Court. This case presents a clear and simple case of contract under state common law which presents to this Court a particularly advantageous opportunity to reaffirm the role of state courts in applying state law remedies to employment disputes which touch only remotely upon plans regulated by ERISA.

CONCLUSION

The employment contract here was specific as to the intended level at which retirement plan accounts of the employees were to be funded by the employer. The ERISA plan description unilaterally prepared by the employer provided for employer funding but did not specify or restrict the contribution amount.

Where the employees perform their work and later are told that the employer has changed his intentions, the funding promises should be enforceable in state court against the employer, its owners and accountant under either state or federal law.

Congress did not intend ERISA's pre-emption clause, 29 U.S.C. Section 1144(a), to prohibit enforcement of an otherwise valid contract without providing for either regulatory or civil enforcement of fundamental contractual obligations to pay earned compensation.

Accordingly, this Court should grant the Writ of Certiorari to the Court of Appeals of Ohio, Hamilton County, and should reverse the decision below, and remand the case to the courts of Ohio for proceedings on the merits of all claims.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

Appeal No. C-870695
Trial No. A8509560

RONALD ERB, et al.,
Plaintiffs-Appellants,
and
SUSAN DOLPH,
Plaintiff,
vs.
ANESTHESIA GROUP PRACTICE, INC., et al.,
Defendants-Appellants.

DECISION
(Filed June 29, 1988)

Civil Appeal from: Court of Common Pleas

Judgment Appealed from is: Affirmed

Date of Judgment Entry on Appeal: June 29, 1988

Joseph R. Jordan, Esq., 2008 Carew Tower, Cincinnati, Ohio 45202, and John W. Eilers, Jr., Esq., 2004 Fifth Third Center, Cincinnati, Ohio 45202, for Plaintiffs-Appellants,

Taft, Stettinius & Hollister, John J. McCoy, Esq., and Michael J. Zavatsky, Esq., 1800 First National Bank Center, Cincinnati, Ohio 45202, for Defendant-Appellees.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Hamilton County, Ohio, the transcript of the proceedings, the briefs and the argument of counsel.

Plaintiffs-appellants are nine certified registered nurse anesthetists who, together with another plaintiff but not an appellant herein, brought suit against their employer, Anesthesia Group Practice, Inc. (AGP); the individual owners and board of directors of AGP; and Clayton L. Scroggins & Associates (Scroggins; collectively referred to as defendants). In their complaint, appellants alleged that AGP breached its employment contracts with appellants by failing to contribute certain amounts to a pension plan and a retirement profit-sharing plan, and they requested that the court order defendants to fund the plans at the proper levels.

Additionally, the complaint alleged that AGP, the owners of AGP, and the board of directors breached their fiduciary duties to appellants by failing to fund the plans at the proper level, and by distributing the money that should have been used to fund the plans to AGP's owners in the form of bonuses. Finally, the complaint charged that Scroggins provided AGP "with bookkeeping and accounting services," and that Scroggins "negligently, recklessly, knowingly or intentionally" facilitated AGP's breach of fiduciary duty.

Appellants also requested sundry other relief, including attorneys fees. The fee request was based on the Employee Retirement Income Security Act (ERISA), Section 1001 *et seq.*, Title 29, U.S. Code. The complaint stated that the "action is maintainable under 29 U.S.C., Section 1332 (a)(1)(B)." As ERISA contains no Section 1332, we presume appellants meant Section 1132, civil-enforcement provision of ERISA[1]

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[1] Section 1132, civil enforcement, states in relevant part:

(a) Persons empowered to bring a civil action

A civil action may be brought —

The parties engaged in discovery, and subsequently defendants moved for summary judgment. In an opinion the trial court held that the breach-of-contract claim was preempted by ERISA, and the trial court entered final judgment in favor of all defendants. From that order, appellants have brought this appeal.

As we view their single assignment of error contending that summary judgment was improper, appellants have raised two separate contentions. First, it is contended that ERISA does not preempt direct employer liability under a pension agreement because such liability would not be inconsistent with the enforcement of ERISA. Second, appellants maintain that even if ERISA does preempt state law, they have a valid federal claim under ERISA, which is cognizable in a state court.

The facts are undisputed. The formal pension-plan document states that AGP would contribute an amount into a pension fund equal to 5% of an employee's salary up to the social security wage limit and 12% of any amounts above that limit.[2] The profit-sharing plan document states that the board

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(1) by a participant or beneficiary —

(A) for the relief provided in subsection (c) of this section, or
(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

[2] The actual language of the pension document in Article III, Section 3.1 states that:

> **Section 3.1 Employer Contributions.** Subject to the provisions of Article IX, Section 9.4, each Fiscal Year the Employer shall contribute to the Trust Fund with respect to each person who is a Participant as of the end of that Fiscal Year, or who was a Participant at the time of his death during that Fiscal Year, and with respect to each participant who retired pursuant to Article IV during that Fiscal Year, an amount equal to the following percentage of such Participant's Compensation for such Fiscal Year: 5% of Compensation not in excess of the benefit and contribution base in effect under the Social Security Act for that Fiscal Year, and 12% of Compensation in excess of such base.

of directors would decide upon the amount to be contributed each year.[3] It is not disputed that AGP followed these formulae each year. Rather, appellants contend that when they were employed they were promised that the plans would be funded at a level equal to 25% of their gross salaries. While defendants denied ever making these statements, they accepted them as true for purposes of the motion for summary judgment.

Briefly, we note that ERISA comprehensively regulates almost all employee-benefit plans for the protection of plan participants and their beneficiaries. This includes pension and other retirement-benefit plans, and it requires the reporting and disclosure of financial and other information, while providing an enforcement mechanism for aggrieved plan participants and beneficiaries. See Sections 1001(b) and 1132, Title 29, U.S. Code.

We have an advantage over the trial court because in the interim between its decision and this appeal the Ohio Supreme Court has addressed many of the issues involved in this case. Ohio's state courts have concurrent jurisdiction with the federal courts to award benefits due under an employee-benefit plan pursuant to Section 1132(e)(1) of ERISA. *Richland Hospital, Inc.* v. *Ralyon* (1987), 33 Ohio St. 3d 87, 516 N.E.2d 1236, paragraph one of the syllabus (revised version published Dec. 7, 1987). However, federal courts have exclusive jurisdiction over ERISA claims for a breach of fiduciary duty. *Id.*, paragraph four of the syllabus. Accordingly, no ERISA claims against AGP's owners, board of directors or Scroggins are cognizable in an Ohio court, insofar as they are based on a breach of fiduciary duty, and summary judgment was proper as to those claims.

In *Richland Hospital, supra*, the Ohio Supreme Court also held that a state common-law claim asserting express, willful

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[3] The profit-sharing plan document states in Article III, Section 3.1 that:

> (a) **Employer Contributions.** Each Fiscal Year the Employer shall contribute to the Trust Fund such amount from its Profit-Sharing Net Profits as shall be determined prior to the end of the Fiscal Year by the Board of Directors.

and malicious misrepresentation against the administrators of an employee benefit plan was preempted by ERISA. *Id.*, paragraph five of the syllabus. The reasoning behind this holding was that Section 1144(a) states that ERISA shall "supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan * * *."[4]

"A law 'relates to' an employee benefit plan, in the normal sense of the phrase [and is therefore pre-empted], if it has a connection with or a reference to such a plan." *Richland Hospital, supra,* citing *Shaw* v. *Delta Air Lines, Inc.* (1983), 463 U.S. 85, 103 N.E.2d 2890 (parenthetical in original). As the misrepresentation was alleged to have been in connection with an employee-benefit plan it was "clearly" preempted by ERISA. Similarly, the breach-of-contract claim together with the claim against Scroggins is in connection with employee-benefit plans, and those claims are preempted insofar as they are grounded in the common law of Ohio.

Thus, we are left with the narrow issue of whether a breach-of-contract claim, as alleged by appellants, is cognizable under the federal common law of ERISA. While Ohio courts can award employee benefits due under plans covered by ERISA, their rationale must be consistent with federal law. *Richland Hospital, supra* at 92, 516 N.E. 2d at 1242. We must decide whether oral agreements may vary the express terms of a written plan, and we hold that the express terms may not be so modified.

We recognize that the federal law regarding oral modification is in conflict. See *Richland Hospital, supra* at 92, 516 N.E.2d at 1242, n.10. We believe that the better view is that the Section 1102(a)(1) requirement that benefit plans are to be "established and maintained pursuant to a written instru-

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[4] Section 1144 states in relevant part:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

It is not contended that any of the exceptions apply to this case.

ment" effectively precludes oral modifications of such plans. *Nachwalter* v. *Christie* (C.A.11, 1986), 805 F.2d 956. This is analagous to the interpretation given to the Labor Management Relations Act, Section 186, Title 29, U.S. Code, whereby a requirement that employee benefit trust provisions in a collective-bargaining agreement must be in writing precluded evidence of oral modifications. *Mo-Kan Teamsters Pension Fund* v. *Creason* (C.A.10, 1983), 716 F.2d 772 certiorari denied *sub nom. Crason* v. *Mo-Kan Teamsters Pension Fund* (1984), 464 U.S. 1045, 104 S. Ct. 716.

While this result may appear harsh in this case, one of the central goals (if not the central goal) of ERISA is to protect the interests of employees and their beneficiaries in employee-benefit plans. *Shaw*, *supra* at 90, 103 S. Ct. at 2896. Permitting oral modifications of the written document could involve protracted litigation, which could, in turn, have the effect of denying benefits to people for years. Even if a fair and just decision was always rendered, severe hardship could result during the pendency of the case. The written plan docment provides objective proof of the plan, and if evidence of oral modifications were permitted numerous baseless lawsuits could be initiated. Additionally, ERISA requires that plan information be given to employees about their benefit plans. See Section 1021, Title 29, U.S. Code. Such a requirement helps to insure that an employee is aware of the precise nature of his benefit plans.

Therefore, we find that, even after construing the evidence most strongly in appellants' favor, there were no genuine issues of material fact, and defendants were entitled to judgment as a matter of law. *Temple* v. *Wean United, Inc.* (1977), 50 Ohio St. 317, 364 N.E.2d 267. The assignment of error is overruled.

The judgment is affirmed.

SHANNON, P.J. BLACK and KLUSMEIER, JJ.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE No. A-8509560

CERTIFIED REGISTERED NURSE ANESTHETISTS OF ANESTHESIA GROUP PRACTICE, INC., et al.
Plaintiffs

vs.

ANESTHESIA GROUP PRACTICE, INC., et al.
Defendants

MEMORANDUM OF DECISION
(Filed August 28, 1987)

Plaintiff, Certified Registered Nurse Anesthetists (CRNA) filed this action for breach of contract against their employer, Anethesia Group Practice, Inc. (AGP) for failure to make contributions to their employee retirement program in amounts allegedly promised. AGP has filed a motion for summary judgment presenting the following issue: is CRNA's claim for breach of contract and fiduciary duties preempted by the Federal Employee Retirement Income Security Act of 1974 (ERISA)? Upon review of the pleadings, affidavits, depositions, exhibits, memoranda and letters of counsel, the answer is, yes.

The employees of CRNA allege that they were hired on the basis of *inter-alia* promises by AGP to contribute to two employee retirement plans in an aggregate amount equal to 25% of salary and bonuses. In reliance upon these and subsequent similar representations the employees maintain that they accepted and continued in their employment with AGP. From 1979 through 1984 AGP's annual contributions to these retirement plans were less than the 25% of salary and bonuses. Although AGP denies entering into such an agreement CRNA's allegations are taken as true for resolution of the issue under Civ. R. 56.

AGP relies upon the written pension plan and a written profit sharing retirement plan, both effective January 1, 1976. They set forth the levels at which each plan was to be funded (Defendants' Motion for Summary Judgment, Exhibits A-1 and A-2), and state that AGP was to fund the pension plan in an amount equal to 5% of an employee's salary up to the (FICA) social security wage limit, and in the amount of 12% for everything above that limit. This formula was precisely followed by AGP each year for every employee. Although the profit-sharing retirement plan did not contain a detailed formula, it expressly gave AGP full power to choose a funding level at the end of each fiscal year. AGP asserts that it made annual discretionary contributions in the same percentage of income for each CRNA employee. It points to the financial statements provided each employee which stated its exact contribution to each employee's respective pension plan and profit-sharing retirement plan accounts during the previous fiscal year.

AGP contends that the Federal Employee Retirement Security Act of 1974 (ERISA) 29 U.S.C. § 1001 et seq., preempts any common law claims for breach of contract relative to both employee benefit (retirement) plans and funding levels at issue. Whether a retirement plan is preempted by ERISA is a question of law, *Amdor* v. *Firestone Tire & Rubber Co.* (Jul. 15, 1987) Summit App. No. 12887, unreported.

The Act's general preemption rule states that ERISA "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan described in Section 1003(a) of this title and not exempt under section 1003(b) of this title." 29 U.S.C. § 1144(a), effective Jan. 1, 1975. An employee benefit plan is defined as "any plan, fund or program . . . which (i) provides retirement income to employees, or (ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan . . . ." 29 U.S.C. § 1002(2)(A).

The scope of ERISA is contained in Section 1001, 29 U.S.C. § 1003(a).

> "(a) Except as provided in subsection (b) and in sections 201, 301, and 401 [29 USCS Sections 1051, 1081, and 1101], this title shall apply to any employee benefit plan if it is established or maintained —
>
> "(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or
>
> "(2) by any employee organization of organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or engaged in commerce or in any industry or activity affecting commerce; or
>
> "(3) by both."

The employees do not assert that any exempton listed in Section 1003(b) is applicable to the AGP employee benefit plan relieving it from Federal regulation under ERISA.

In authorizing application of state common law or state statute in lieu of Federal preemption the Supreme Court distinguishes *"employee benefits"* from *"employee benefit plans"* within the meaning of ERISA. *Fort Halifax Packing Co., Inc.* v. *Coyne* (1987), 482 U.S. ____, 107 S.Ct. 2211; 96 L. Ed.2d 1. In *Fort Halifax,* after closing its packaging plant and laying off most of its employees, Maine's Bureau of Labor Standards ordered the employer to provide a severance payment for economic dislocation as provided by a Maine statute. In upholding application of the state statute the Court noted that "ERISA's pre-emption provision does not refer to State laws relating to 'employee benefits,' but to State laws relating to 'employee benefit plans.' " *Id.*, 96 L. Ed.2d at Page 9. Since there was a one time lump-sum payment, the Court held it to be merely an employee *benefit* covered by state statute rather than an employee benefit *plan* subject to preemption by ERISA, (emphasis added).

The Supreme Court explained that the importance of this

distinction between employee benefits and employee benefit plans arises from the Congressional purpose which is: "to allow plans to adopt a uniform scheme for coordinating complex administrative activities, unaffected by conflicting regulatory requirements in differing states." *Id.*, at Syllabus Par. (1)(b). ERISA preemption enables both the employer and employee to look to one source for their obligations and expectations thereby eliminating this very type of dispute. The Supreme Court also addressed "the regulatory concerns of RISA itself, which was . . . to ensure administrative integrity in the operation of plans by preventing potential fiduciary abuse." *Id.*, at Syllabus Par. (1)(c). In holding that "the Maine statute does not implicate [this] regulatory concern [of ERISA because this statute] neither establishes a plan nor generates any administrative activity capable of being abused," *Fort Halifax* supports AGP—'s argument that the employee benefit plans in question must be subject to ERISA regulation for the same reason that the Maine statute, as applied to merely an employee *benefit*, was not (emphasis added). *Id.* at Syllabus Par. (1)(c).

CRNA contends that alleged promises by AGP to fund these benefit plans at an amount equal to 25% of gross salary and bonuses altered their written ERISA plans. At best, however, such promises were either informal unwritten amendments to AGP's existing written ERISA plans or oral agreements. Under ERISA oral modifications are impermissible because Congress expressly prohibited informal written amendments to ERISA plans. *Nachwalter* v. *Christe* (11th Cir. 1986), 805 F.2d 956. Section 1102(b)(3) of ERISA requires "every employee benefit plan [to] provide a procedure for amending such plan and for identifying the persons who have authority to amend the plan . . . ," and the *Nachwalter* Court concluded that "by explicitly requiring that each plan specify the amendment procedures, Congress rejected the use of informal written agreements to modify an ERISA plan." *Id.*, at 960.

Article VIII of the AGP pension and profit-sharing retirement plans provide procedures for "*Amendment And Ter-*

mination Of The Plan." The manner, in which the alleged agreements altering the funding levels of the benefit plans were made, is not in accord with Article VIII of either the AGP pension or profit-sharing retirement plans. In focusing specifically upon the effects of oral agreements altering ERISA written plans the *Nachwalter* Court quoted from *Shaw* v. *Delta Airlines, Inc.*, (1983), 463 U.S. 85, 90; 103 S. Ct. 2890; 77 L. Ed.2d 490: "A central policy goal of ERISA is to protect the interests of employees and their beneficiaries in employee benefit plans." The *Nachwalter* Court concluded that the goal of ERISA would be undermined by oral modifications of ERISA Plans. Employees could not "rely on their Plans if expected retirement benefits could be radically affected . . . pursuant to oral agreements." *Id.*, at 960; *Hollenbeck* v. *Falstaff Brewing Corp.* (E.D. Mo. 1984), 605 F. Supp. 421.

For the foregoing reasons CRNA's claim for breach of contract is preempted by ERISA which supersedes state common law or laws relating to employee benefit plans. Therefore AGP's motion for summary judgment is granted as to its alleged oral promises or amendments, and judgment is rendered in favor of defendant against the plaintiff. Plaintiff's motion for summary judgment is overruled. Counsel will present an endorsed entry reflecting the Court's decision by September 10, 1987.

Robert H. Gorman, Judge

cc: John W. Eilers, Jr., Esq.
and
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Attorneys for Plaintiff

John J. McCoy, Esq.
and
Michael J. Zavatsky, Esq.
Attorneys for Defendant

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A-85-9560
(Judge Gorman)

CERTIFIED REGISTERED NURSE
ANESTHETISTS ("CRNAs") of
ANESTHESIA GROUP PRACTICE, INC., ET AL.
Plaintiffs

v.

ANESTHESIA GROUP PRACTICE, INC., ET AL.
Defendants

ENTRY GRANTING SUMMARY JUDGMENT AND OF FINAL JUDGMENT IN FAVOR OF DEFENDANTS

This cause coming on to be heard before the Court of Defendants' motion for summary judgment; based upon the motion, affidavits, supporting and opposing memoranda, arguments of counsel and the entire record in this case, the Court finds as follows:

(1) Reasonable minds can come to but one conclusion and that conclusion is adverse to Plaintiffs,

(2) There is no genuine issue as to any material fact and Defendants are entitled to judgment in their favor as a matter of law.

Accordingly, Defendants' motion for summary judgment is hereby GRANTED and final judgment is hereby entered in favor of all Defendants herein, at Plaintiffs' costs.

/s/ ROBERT H. GORMAN

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COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

Case No. C-870695
A-8509560

RONALD ERB, ET AL.

Plaintiffs

v.

ANESTHESIA GROUP PRACTICE, INC., ET AL.

Defendants

JUDGMENT ENTRY
(Entered June 29, 1988).

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the arguments of counsel.

This cause came on to be heard upon the appeal on questions of law, assignments of error, the record from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignment of error is not well taken for the reasons set forth in the Decision filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgment of the Court of Common Pleas of Hamilton County, Ohio, be, and the same hereby is, affirmed.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Decision attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

To all of which the Appellants, by their counsel, except.

SUPREME COURT OF OHIO
COLUMBUS
1988 TERM
To wit: October 12, 1988

Case No. 88-1485

CERTIFIED REGISTERED NURSE ANESTHETISTS, INC., ET AL.
Appellants,

v.

ANESTHESIA GROUP PRACTICE, ET AL.
Appellees.

ENTRY

Upon consideration of the motion for an order directing the Court of Appeals for Hamilton County to certify its record, it is ordered by the Court that said motion is overruled.

COSTS:

Motion Fee, $20,00, paid by Joseph R. Jordan.

/s/ THOMAS J. MOYER
Chief Justice

I, Marcia J. Mengel, Clerk of the Supreme Court of Ohio do hereby certify that the foregoing order was correctly copied from the records of said Court, to wit, from the Journal of this Court.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Supreme Court, on this 12th day of October, 1988.

MARCIA J. MENGEL, CLERK
/s/ RITA A. JACKSON, DEPUTY

THE SUPREME COURT OF OHIO
1988 TERM
To wit: November 23, 1988
Case No. 88-1485

CERTIFIED REGISTERED NURSE
ANESTHETISTS, INC., ET AL.
Appellants,

v.

ANESTHESIA GROUP PRACTICE, ET AL.
Appellees.

REHEARING ENTRY
(Hamilton County)

It is ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.

/s/ THOMAS J. MOYER
Chief Justice

IN THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A8509560

CERTIFIED REGISTERED NURSE
ANESTHETISTS ("CRNAs") of
ANESTHESIA GROUP PRACTICE, INC., ET AL.
Plaintiffs

v.

ANESTHESIA GROUP PRACTICE, INC., ET AL.
Defendants

COMPLAINT
(Filed November 29, 1985)

1. This is an action for breach of contract by the employees of Anesthesia Group Practice, Inc., against their employer for failing to make contributions to the retirement fund in the amounts promised to employees under the terms of their contracts of employment, for failing to make up the deficiencies upon discovery, and for knowingly distributing the funds of the corporation as bonuses to the individual defendant physicians, and against the individual defendant physicians for breaches of the fiduciary duties owed by them to the employee-participants in the retirement plan.

2. This action seeks compensatory damages for each employee for the lost value in retirement benefits caused by the deficiencies in employer contributions, including lost income thereon and lost tax free accumulation of retirement funds, for an accounting, and for appropriate injunctive relief, including a mandatory injunction ordering non-taxable payments to the retirement plan accounts in the amount of the deficiencies and lost income, or, in the alternative, to the extent that such contributions cannot be made tax free to the

retirement fund accounts, damages in the amounts necessary to provide the same after tax retirement benefits as would have been provided had the promised contributions been timely made.

3. This action also seeks to enjoin the individual defendants from removing from the corporation, by drawing bonuses in excess of present salary, the funds necessary to satisfy the contractual obligation to the employees, and to order the individual defendants to restore to the employer corporation, such amounts drawn therefrom in bonuses since the discovery of the contribution deficiencies.

4. This action further seeks damages from the manager and accountant of the employer, Clayton F. Scroggins & Associates, for its negligence in causing the shortages in employer contributions and its failure to follow the instructions of the employer regarding its declared intentions in computing the plan contributions.

THE PARTIES

5. The defendant, Anesthesia Group Practice, Inc. ("AGP"), is an Ohio professional corporation, which, through its employees, engages in the practice of medicine by providing anesthesia services at the Bethesda Hospital facilities in and around Cincinnati, Ohio.

6. All of the individual parties hereto were employed by AGP at some time between January 1, 1979, and March 16, 1985.

7. The defendants Drs. Casper, Possert, Rohrer, Dalton, Zumkhawala, Beluan, and Alino were, immediately prior to, and have been since, March 16, 1985, each a director, shareholder and employee of AGP. Of these defendants, Drs. Casper, Rohrer, Possert, and Dalton are members of the pension and profit-sharing committee of AGP, and Dr. Casper is the president of AGP and the officer having such authority as is necessary to negotiate and agree to the terms of employment for the physicians and nurses employed by AGP.

8. The defendant, Clayton L. Scroggins & Associates

("Scroggins"), is a management and accounting firm specializing in the financial management of professional groups, particularly groups of physicians which include AGP.

9. The named plaintiffs, Susan Dolph, Ronald Erb, Kathleen Erb, Richard Everett, Linda Fein, Joann Blake, David Paul, Susan Paul, Hannah Phero, Judie Sclafani, and Jerry Zoeller, are Certified Registered Nurse Anesthetists ("CRNAs") each employed by the defendant AGP on or before March 16, 1985. Each is a vested participant in the pension and profit-sharing plan of AGP. Each seeks to maintain this action individually and on behalf of all of the CRNAs and others similarly employed by AGP and who have not been shareholders of AGP since March 16, 1985, who are participants or have interests in its retirement plan, either by virtue of their continued employment, or by virtue having been a vested participant and having left employment on or after January 1, 1979.

10. The named plaintiffs bring this action as a class action pursuant to Rule 23 of the Ohio Civil Rules, or, in the alternative, if joinder of all members is not impractical, by joinder pursuant to Civil Rules 19 through 21, of those parties having an interest in the subject matter of this action, whose rights may be affected by judgment in this action, and who may be required to participate in the relief granted in this action.

11. Those persons employed by AGP between January 1, 1979, and March 16, 1985, include the following the plaintiffs named above, and in addition: Diann Hart, Herz Drive, Cincinnati, Ohio 45242; James Clapp, 1542 Acreview Drive, Cincinnati, Ohio 45240; Patricia Beardon, Covington, Kentucky; Dennis Edwards, 1527 Barvac Avenue, Cincinnati, Ohio 45223; Jenifer Ellis, Cincinnati, Ohio; Don R. Kroner, 4482 Glenridge Drive, Cincinnati, Ohio 45245; Michael Masters, 1802 Mount Vernon Drive, Fort Washington, Kentucky 41011; Philip L. McDonald, 9461 Hunters Creek Drive, Cincinnati, Ohio 45242; Karen L. Quealy, 170 Francisridge Drive, Cincinnati, Ohio 45238; Jean McCown, Melbourne, Florida; David VanVoorhis, 4017 Pinehurst Drive, Amarillo,

Texas 79109; Victoria Wilson, 2109 Cornet Drive, Newport Ritchie, Florida 33552; Patricia Mathena, 7890 Hickory Hill Lane, Cincinnati, Ohio 45241; Mary Bohn, Eight Mile Road, Cincinnati, Ohio; Brian Robins, M.D., 8186 Monte Drive, Cincinnati, Ohio 45242; Pamela Webb, M.D., 871 Squire Oaks Drive, Villa Hills, Kentucky 41017; Rajal Bhutta, M.D., 7400 Belkay Drive, Cincinnati, Ohio 45237; Joel Bromley, M.D., 4855 LeBlond Ave., Cincinnati, Ohio 45226; Alfred W. Erb, M.D., 3694 Traskwood Circle, Cincinnati, Ohio 45208; and John Doerr, M.D., 9915 Knollwind Drive, Cincinnati, Ohio 45242.

12. Diann Hart and James Clapp, are CRNAs employed by AGP from prior to January 1, 1979, to date, and are vested participants in the pension and profit-sharing plan of AGP.

13. Patricia Beardon, Dennis Edwards, Jenifer Ellis, Don Kroner, Michael Masters, Philip McDonald, and Karen Quealy, are CRNAs currently employed by AGP, and who have been employed by AGP from some time between January 1, 1979, and March 16, 1985. Each is a participant, but not yet a vested participant, in the pension and profit-sharing plan of AGP.

14. Jean McCown, David VanVoorhis, Victoria Wilson, Patricia Mathena, and Mary Bohn, are CRNAs who were employed by AGP between January 1, 1979, and March 16, 1985, but are no longer employed by AGP. Each was a vested participant in the pension and profit-sharing plan of AGP.

15. Brian Robins, Pamela Webb, Rajal Bhutta, and Joel Bromley, are each doctors of medicine ("MDs") employed by AGP from some time prior to March 16, 1985, and to the present. Each is a participant, vested or non-vested, in the pension and profit-sharing plan of AGP.

16. John Doerr and Alfred Erb, are each MDs who were employed by AGP at some time between January 1, 1979, and March 16, 1985, but who are no longer employed by AGP. Each was a vested participant in the pension and profit-sharing plan of AGP.

THE EMPLOYMENT AGREEMENT

17. From 1971 to the present, AGP maintained a retirement plan for the mutual benefit of the controlling physicians of the group (often and hereinafter referred to as "the partners"), the associates physicians employed by AGP, and the CRNAs. The philosophy of the plan has been to provide additional compensation in addition to salary and bonuses, and to take advantage of tax free accumulation of retirement funds available through such plans.

18. From 1971 through March 16, 1985, AGP hired and employed CRNAs and associate MDs to assist in the administration of anesthesia at the Bethesda Hospitals in Cincinnati. During this period, each was hired on the basis of an agreed salary for the calendar year plus contributions by AGP to the retirement account of each employee in an amount equal to 25% of the salary and bonuses.

19. At the time of the hiring of each employee, and repeatedly and consistently thereafter through March 16, 1985, AGP promised and represented to each employee that it would contribute annually to the retirement fund accounts of each an amount equal to 25% of salary and bonuses. In reliance on these promises, the employees accepted their employment and continued to work for AGP.

20. From 1971 through 1978, AGP made annual contributions to the retirement plan in amounts which, for the CRNAs, ranged from 20.5% to 30.2% of their salaries, and averaged 23.9% of salary.

21. The contributions to the retirement plan by AGP were made by depositing at various times throughout the year an amount into a pension fund account and an amount into a profit-sharing fund account, both accounts being held by a bank which was the trustee of the funds. The amounts to be contributed by AGP were calculated by the defendant Clayton F. Scroggins & Associates. Several months after the end of each year, a final contribution was made by AGP, and the trustee thereupon calculated and apportioned to the accounts of each employee the employee's respective share of

the amounts contributed plus income earned by the trustee on the contributions.

THE CONTRIBUTION DEFICIENCIES

22. From 1979 through 1984, the annual contributions by AGP to the retirement fund were less than they had been through 1978, though that fact was not obvious from the reports received by the employees. The amounts contributed for the employees varied with salary range, but for the CRNAs were approximately as follows:

1979: 19.66% to 23.93%;
1980: 15.22% to 19.63%;
1981: 18.79% to 22.91%;
1982: 12.15% to 16.12%;
1983: 12.03% to 16.22%;
1984: 8.15% to 12.24%.

23. In the spring of 1983, when reports of the 1982 retirement plan were received by the employees, plaintiff Ronald Erb informed the defendant Dr. Casper that the contributions appeared to be less than the 25% promised. Dr. Casper explained that he did not know the reason, but upon checking with defendant Scroggins reported that it was due to changes in the tax laws relating to the social security limits. Dr. Casper nonetheless reaffirmed that the retirement plan was based on 25% of base salary.

24. In the spring of 1984, upon receipt of the reports for the year 1983, plaintiff, Ronald Erb similarly questioned the amount of the contribution to his retirement fund. Dr. Casper gave the same explanation he gave the year before, and again reaffirmed that the retirement plan was based on 25% funding. The reassurance of 25% funding was continuously made to other CRNAs until March 16, 1985. Written documents provided to the employees which referred to the retirement plan reaffirmed that the employer's contributions would be at 25% of base salary. Throughout this

period, MDs and CRNAs were hired on the basis of a specified salary plus a 25% additional contribution to the retirement fund annually. Some received a written statement of the terms of the contribution. In reliance upon the reassurances that it was the intent of AGP to fund the retirement plan at 25%, the employees continued to work.

25. On March 16, 1985, a meeting was called by defendant Dr. Casper of the CRNAs. At the meeting, the defendants, Drs. Casper and Rohrer explained that it had been realized that, due to changes in the tax laws and the escallation of the social security limit, the contributions to the retirement fund had been less than 25%. Dr. Casper nonetheless reaffirmed that the plan had been to fund at 25%, but that the impact of the integration formula had been greater than expected. Dr. Casper stated that from that point on, there could be no guarantee of any specific funding level for the retirement fund.

26. Prior to March 16, 1985, every representation made by AGP to the employed association MDs and CRNAs, and every writing provided to them was consistent with the understanding that employer funding of the retirement plan would be at 25% of the base salary of each employee.

The lesser deficiencies:

27. From 1979 through 1985, there existed at some location, written documents containing the terms of the pension and profit-sharing plans which constituted the agreement between AGP and a bank which served as trustee for the funds. The board of AGP had complete unilateral authority to change the plans and to control the formula for their funding, provided the agreements contained no terms which were illegal or deprived the employees of federally protected rights. Beyond that, the board of AGP had complete power to conform these documents to any promises made to employees by AGP to fund the plans at a combined amount of 25% of salary, with or without relation to any limit relating to social security.

28. Each plan document contained a clause relating to the funding of the plans through contributions by the employer. At some time prior to March 16, 1985, the pension plan document contained a formula, applicable to calandar years beginning with 1978 and added sometime thereafter, which provided for contributions at 5% of the salary up to the social security (FICA) wage limit, and 12% for everything above the limit. The profit-sharing plan document contained no formula but recited that the board of AGP had full power and discretion to fund that plan at any level, and contained no reference to the FICA limit or integration with social security.

29. From 1979 through 1985, the tax laws limited the amount of contributions which could be sheltered in pension and profit-sharing plans to 25% of the individual's salary, and the amount which could be sheltered in the profit-sharing portion of a plan to 15% of salary. The tax laws did not prevent funding of retirement plans by employers to amounts greater than 25% of salary, but prevented tax free receipt by the employees of funding in excess of that amount.

30. From 1979 to 1984, the FICA limit increased from $22,900 to $37,800. As a result of this and the use of the 5%/12% integration formula by defendant AGP, by 1984, AGP could have made tax free retirement contributions at 25% of salary only to employees with salaries in excess of $112,300. Employees with salaries of $37,800 and less could receive tax free contributions only at 20% of salary. The others could receive something between 20% and 25%, depending on salary and bonuses received for the year.

31. By failing to provide a pension plan funding formula effective to give to the lower paid employees contributions of 10% of their salaries, AGP has breached its contract with the employees.

32. As a result of its breach of contract, AGP is liable for deficiencies to the pension funds. These deficiencies and lost income thereon for the CRNAs alone total approximately $170,000.

The greater deficiencies:

33. The declared policy and the intention AGP has been for its board to exercise its discretion so as to fund the profit-sharing plan to provide the maximum tax free contribution to each employee.

34. In 1982, the federal tax laws were amended to allow only a maximum of $30,000 per year of income to be sheltered for any individual in a retirement plan. As a result, persons with incomes of more than $120,000 could not receive tax free contributions to a retirement fund in amounts equal to a full 25% of their incomes.

35. In response to the 1982 change in the tax laws, defendant Scroggins, contrary to the declared intention of the AGP board, computed the AGP profit-sharing contribution at only the amount necessary to fund the retirement plans of the partners to the limit of $30,000 per year. Because these doctors were drawing income substantially in excess of $120,000, a percentage of less than 25% was contributed for all, as follows:

Year	Income of Doctors	Pension Amount	Profit-sharing Amount	Percent Profit-sharing
1982	$161,340	$17,093	$12,907	8.0%
1983	$169,266	$17,813	$12,187	7.2%
1984	$211,987	$22,792	$ 7,208	3.4%

36. In addition to the above formula, defendant Scroggins computed the amounts to be contributed to the profit-sharing plan for the years 1979 through 1981 at amounts lower than 15% to provide funds for additional salary bonuses to the partners, either with or without the knowledge of the board of the impact on the retirement fund for the lower paid employees.

37. As a result of the failure of AGP to adequately fund the profit-sharing fund, defendants AGP and Scroggins are liable to the employees for the funding deficiencies. For the CRNAs alone, these deficiencies, with lost income, total approximately $250,000.

38. In the alternative, one or more of the partners of AGP either were aware that the contribution amounts being computed by defendant Scroggins were inadequate to fulfill the promises being made to the employees and failed to see that the computations were corrected or the promises revised, or, aware that the contributions were to be less than the amounts promised, willfully, wantonly, or in reckless disregard of the accuracy thereof, continued to represent to the employees that it was the intention of AGP to fund the profit-sharing plan at 15% of salary, and the retirement plan at a total of 25% of salary, to induce performance by the employees.

Future contributions:

39. Each employee of AGP was hired upon the representation that compensation would include an additional 25% contribution to the retirement fund. Each accepted employment and performed services for AGP in reliance upon and in expectation of the promised contributions. Each gave up alternative employment opportunities and undertook other changes in personal circumstances in reliance upon the promised compensation. Each would have to incur additional inconvenience and expense if a further change in job position were necessary to secure equivalent compensation. The employees, particularly the more recently hired, will receive inadequate consideration for what they gave up in reliance on the promises.

LOSS OF TAX BENEFITS

40. A characteristic and principal advantage of retirement plans of the type utilized by AGP is that the employer may make tax deductible contributions to the retirement fund for each employee and that neither the contributions nor the income earned thereon are taxable to the employee until the funds are to be withdrawn, usually upon retirement. As a result of this tax free accumulation, the employee may expect a greater amount of after tax money at retirement than had

the contributions been taxed when made and the income on it taxed when earned.

41. Unless contribution deficiencies are made up in a form which will accumulate tax free until retirement, as they would have if made in a timely manner, the amount of money necessary to compensate the employees for their losses will be much greater.

42. For the currently employed CRNAs, the retirement funds of each would be expected to accumulate tax free for an average of thirty years. Accordingly, it should be expected that, after taxes, the retirement income from non-taxable contributions made now will be approximately 3.2 times greater than they would be if the contributions were taxed.

43. Unless the delinquent contributions are restored to the employees in a manner which would accumulate tax free until retirement, in addition to the $420,000 in contribution losses suffered by the CRNAs alone, an additional $1,050,000 in damages will be due to the CRNAs in order to restore them to the position they would have been in had AGP honored its promises.

CONDUCT OF SCROGGINS

44. Defendant Scroggins has been hired by AGP to provide financial management, bookkeeping and accounting services for the medical group, including such services to AGP and the partners in connection with their duties with respect to the retirement plan and its participants.

45. As a result of their relationship with AGP and its partners, defendant Scroggins owed to AGP at all times relevant to the subject matter of this complaint the fiduciary duties incumbant upon management of the professional corporation and upon their certified public accountants. These duties include the duty to exercise due care and loyalty to AGP and its partners and the responsibility to exercise those duties so as to assist AGP and its partners to perform their own duties in accordance with the standards applicable to them, and not to induce or knowingly facilitate breaches of duties by the AGP or its other fiduciaries.

46. AGP determined and made its contributions to the retirement fund in reliance upon Scroggins the advice and computations of defendant Scroggins.

46. Scroggins was aware that AGP would determine the amount of contributions to the retirement fund in reliance upon its advice and computations, and intended AGP to do so.

47. Scroggins forsaw that erroneous computations and advice by it concerning the amounts to be contributed to the retirement plan would result in losses to the employees-participants in the plan.

48. Scroggins was aware of shortages but acted in conscious disregard of the consequenses and advised AGP to contribute at levels which made Scroggins' work appear efficient and worthwhile.

49. Scroggins forsaw that funds which should have paid to the retirement plan, if not paid, would be depleted through the payment of bonuses to the partners or diversion to other purposes, and it counseled AGP in the diversion of those funds.

50. Scroggins negligently, recklessly, knowingly or intentionally facilitated and induced AGP and its officers to breach their contracts with the employees and their fiduciary duties to the participants in the retirement plan.

51. As a result of its conduct, defendant Scroggins is liable to AGP and its partners, and is liable, directly and jointly with AGP and its partners, to those injured by the failure of AGP to adequately contribute to the retirement plan for the employees.

52. As result of Scroggins Actions, the injuries to the plaintiffs and other employees complained of herein were suffered.

BREACH OF FIDUCIARY DUTIES

53. The individual defendants owe duties of due care and loyalty to AGP, and duties of utmost good faith toward each other in connection with the performance of their responsibilities as shareholders, directors and officers of AGP.

54. By failure to pay sufficient attention to the financial affairs of AGP so as to see that AGP was fulfilling its contractual obligations in accordance with the promises it was making to the employees, the partners breached their duties of care to AGP.

55. By drawing bonuses from the professional corporation after awareness of the debt to the retirement funds of employees so as to deplete the funds of the corporation, the partners have breached their duties of due care and loyalty to AGP.

56. The breaches of duty set forth above render the individual partners liable to AGP and indirectly to, or for the benefit of the claims of, the plaintiffs and the other employees.

INJUNCTIVE RELIEF

57. Since March 16, 1985, the individual defendants have been knowingly withdrawing, as bonuses in excess of salary, substantial funds, leaving in the professional corporation of AGP funds insufficient to restore to the retirement funds of the employees the amounts of the deficiencies in contributions promised them.

58. Much of the excess income drawn by the individual defendants from AGP is paid as taxes and otherwise expended so as to be irretrievable to satisfy the claims of AGP and its employees.

59. Failure to make timely contributions to the retirement plan or to make timely cure of the deficiencies will increase from about $400,000 to about $1,500,000 the amount of money necessary to fully compensate the employees for the losses in retirement income.

60. AGP is a professional corporation which has virtually no capital or corporate assets, and no contract with the hospitals which it serves, and thus no assured income for the future.

61. Unless restrained and enjoined from depleting the assets of the corporation to levels insufficient for the corpora-

tion to honor its contractual obligations to the employees, and unless ordered to restore while available the funds to cure the deficiencies which were drawn from the corporation by them after they became aware of the obligations, and unless ordered to take measures necessary to preserve the tax saving aspects in connection with the ultimate restoration of the deficiencies owed, the defendants will be incapable of satisfying these obligations or a judgment of this court, the employees will be irreparably harmed by the permanant loss of retirement income, and will have no adequate remedy at law.

THE INTERESTS OF ALL PLAN PARTICIPANTS

62. In order to retain the tax status of the retirement plan and tax free treatment of contributions to the plan or of restored deficiencies in past contributions to the plan, a certain equality of treatment of all participants in the plan is required.

63. Equal treatment of all participants in the plan might require an adjudication, alteration, enforcement, adjustment, or other determination of the rights of all employees of AGP who have been injured by the events complained of herein.

64. In order to effectively and/or efficiently grant relief in this action, and in the interests of justice, it might be appropriate that joinder of all parties be made in accordance with the provisions of Civil Rules 19 through 21. To the extent that joinder of any member of the class is impossible, it might be appropriate to all members of the class be joinded in accordance with the provisions of Civil Rule 23.

CLASS ACTION

65. The class is so numerous that joinder of all members, including all CRNAs and MDs employed from January 1, 1979 through March 16, 1985 is impracticable.

66. There are questions of law or fact regarding the obligation of AGP to fund the retirement plan at levels higher than it did, and to the financial facts regarding the amount at

which those contributions should have been made, and other issues set forth above, are common to the class. Contributions to the retirement plan must be paid to the funds of each employee in accordance with a generally applicable and non-discriminatory formula.

67. The claims of the representative parties are typical of the claims of the class. The representations promises to all employees were consistent with the claims set forth herein. Contributions to the plan will effect all participants uniformly. The more complex factual issues regarding the financial data, and the legal issues involved in these claims, will be present whether one or all employees adjudicate their claims.

68. The representative parties will fairly and adequately protect the interests of the class, and have at all times during the course of this controversy made a committment to securing relief for all. The representative parties are those whose interests in the retirement plan are vested, and accordingly, the representative parties are less vulnerable to pressures by the employer.

69. The prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual employees which would establish incompatible standards of conduct for the defendants.

70. The prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

71. The defendants have acted and refused to act on grounds generally applicable to the class in failing to make the promised contributions and refusing to make up the deficiencies, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

72. The questions of law and fact which are common to

the members of the class predominate over any questions affecting only individual members.

73. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

74. The members of the class have no interests in individually controlling the prosecution of separate actions which cannot be protected in a class action.

75. There is no other litigation concerning the controversy already commenced by or against members of the class.

76. The difficulties likely to be encountered in the management of a class action will be less than attempting to formulate relief by joinder of all class members of by proceeding without parties whose interest may be affected by this action.

ATTORNEYS FEES

77. This action is maintainable under 29 U.S.C., Section 1332 (a)(1)(B).

78. Based on the allegations set forth herein, the plaintiffs are entitled to recover under 29 U.S.C., Section 1332(g) their costs and reasonable attorney's fees from the defendants.

WHEREFORE, plaintiffs demand judgment as follows:

a. For damages in the amount of all deficiencies in retirement fund contributions, with interest to date, for all participants suffering shortages in employer contributions for the calendar year 1979 through March 16, 1985, and for an order directing payment in a tax free manner to the retirement fund, the amount of such judgment being approximately $420,000 for the CRNAs;

b. In the alternative to a. above and to the extent that the deficiencies cannot be restored in a tax free manner, a judgment for damages sustained by each person employed by AGP from January 1, 1979, through March 16, 1985, in the amount of all deficiencies in contributions to the retirement fund, with lost income thereon, plus such additional amounts as are necessary to adjust for the loss of the tax fee accumula-

tion of retirement funds which would have been available had contributions been made for each in a timely manner, the amount of such additional damages being approximately $1,050,000 for the CRNAs;

c. For an order enjoining and restraining the individual defendants from drawing additional bonuses in excess of present salary and ordering the individual defendants to restore to the employer such bonuses that have been drawn from the corporation since discovery of the shortages in employer contributions to the retirement fund in early 1985, until sufficient funds are accumulated in AGP to satisfy the amounts under a. and b. above;

d. For attorneys fees;

e. For costs;

f. For such other relief as to which the plaintiffs may be entitled.

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COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A8509560
(Judge Gorman)

CERTIFIED REGISTERED NURSE ANESTHETISTS ("CRNAs") OF ANESTHESIA GROUP PRACTICE, INC., et al.

Plaintiffs,

v.

ANESTHESIA GROUP PRACTICE, INC., et al.

Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
(Filed September 3, 1986)

Defendants move this Court, pursuant to Ohio Civil Rule 56, to enter judgment in their favor on Plaintiffs' Complaint for the reason that there is no genuine dispute as to any material fact and Defendants are entitled to judgment as a matter of law. The grounds for this motion are that the claims stated in Plaintiffs' Complaint are preempted under the clear wording of the Employee Retirement Income Security Act of 1974 ("ERISA").

This motion is supported by the entire record in this case including the pleadings, the Affidavit of Joseph Casper, M.D. attached hereto, and the discovery filed with the Court.

Respectfully submitted,

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ASSIGNMENT OF ERROR FILED IN THE COURT OF APPEALS

THE TRIAL COURT ERRED IN GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Issue Presented for Review

Whether ERISA preempts the enforcement of Ohio contract law against an employer for breaches of the promises of an employment contract to contribute at a promised rate to each employee retirement fund account.

Proposition of Law No. 1:

ERISA "does not preempt direct employer liability under a pension agreement. * * *" "It is not inconsistent with the statutory scheme to permit employees to recover directly from the employer any additional benefits to which the employer has contractually obligated itself."

Murphy v. *Heppenstall Co.* (3rd Cir. 1980), 635 F.2d 233, 237 and 239.

Proposition of Law No. 2:

Even if the employer's contract to make retirement fund contributions were to be preempted by ERISA "the preemption problem is irrelevant to the existence of a valid contract because nothing in ERISA indicates that Congress intended to make contracts unenforceable."

Holliday v. *Xerox Corp.* (E.D. Mich. 1982), 555 F.Supp. 51, 55, aff'd. (6th Cir. 1984), 732 F.2d 548.

Proposition of Law No. 3:

"ERISA does not, however, require a formal, written plan. * * * it would be incongruous for persons establishing or maintaining informal or unwritten

employee benefit plans, or assuming the responsibility of safeguarding plan assets, to circumvent the Act merely because an administrator or other fiduciary failed to satisfy reporting or fiduciary standards. * * *"

Donovan v. *Dillingham* (11th Cir. 1982, *en banc*) 688 F.2d 1367, 1372.

PROPOSITIONS OF LAW PROPOSED IN THE SUPREME COURT OF OHIO

Proposition of Law No. 1:

An employer's written and oral promises to compensate employees with specific payments to their retirement accounts constitute an enforceable employment contract. An employer who makes such promises and receives in return the performance of the employees may not thereafter renege on the promises with impunity. Direct claims against the employer to recover what the employer has voluntarily promised are not pre-empted by the Employee Retirement Income Security Act (ERISA). *Murphy* v. *Heppenstall Co.* (3rd Cir. 1980), 635 F.2d 233. It claims to recover benefits against plan administrators which are pre-empted by ERISA. *Richland Hospital, Inc.* v. *Ralyon* (1987), 33 Ohio St. 3d 87. ERISA pre-empts only state laws which conflict with federal regulation of benefits whose provision requires an ongoing administrative program to meet the employer's obligation. *Ft. Halifax Packing Co.* v. *Coyne* (1987), 482 U.S. ____, 107 S.Ct. 2211, 96 L.Ed. 1.

Proposition of Law No. 2:

An employer's obligations arise from his contracts with the employees, not from the employer's plan documents. *Donovan* v. *Dillingham*, (11th Cir. 1982, *en banc*) 688 F.2d 1367. Accurate preparation of plan reporting documents is a statutory obligation of the employer. Where formal plan documents prepared by an employer are not inconsistent with his promises, they cannot be said to preclude enforcement of the employment contract. Nonetheless, the terms of an ERISA regulated plan are a matter of contract and can be proven with evidence of the intent of the parties to the employment agreement. *Northwest Administrators, Inc.* v. *B.V. & B.R., Inc.*, (9th Cir. 1987), 813 F.2d 223.

No. 88-1139

SUPREME COURT, U.S.
FILED
FEB 27 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CERTIFIED REGISTERED NURSE ANESTHETISTS OF ANESTHESIA GROUP PRACTICE, RONALD W. ERB, KATHLEEN ERB, JOANN JOHNSON BLAKE, DAVID R. PAUL, SUSAN PAUL, JUDIE SCALFANI, and JERRY ZOELLER

Petitioners

vs.

ANESTHESIA GROUP PRACTICE, INC., CLAYTON L. SCROGGINS & ASSOCIATES, JOSEPH M. CASPER, M.D., JOSEPH POSSERT, M.D., RICHARD ROHRER, M.D., WILLIAM DALTON, M.D., ASHVIN ZUMKHWALA, M.D., ANDRES BELUAN, M.D., and LITO ALINO, M.D.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO HAMILTON COUNTY

BRIEF OF RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Federal Law of ERISA Preempt All State Causes of Action Relating To Pension And Profit-Sharing Plans, Including Petitioners' Claims for Alleged Breaches of Funding Levels of the Plans?

2. Do State Law Claims For Increased Funding Of Employee Benefit Plans "Relate To" Those Plans To The Effect That Those Claims Are Preempted in Accordance With Controlling Federal Law?

3. Under the Federal Common Law of ERISA, Are Alleged Oral Or Informal Written Agreements That Attempt To Vary The Terms of Written ERISA Plans Enforceable?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

No. 88-1139

CERTIFIED REGISTERED NURSE ANESTHETISTS OF ANESTHESIA GROUP PRACTICE, RONALD W. ERB, KATHLEEN ERB, JOANN JOHNSON BLAKE, DAVID R. PAUL, SUSAN PAUL, JUDIE SCALFANI, and JERRY ZOELLER

Petitioners

vs.

ANESTHESIA GROUP PRACTICE, INC., CLAYTON L. SCROGGINS & ASSOCIATES, JOSEPH M. CASPER, M.D., JOSEPH POSSERT, M.D., RICHARD ROHRER, M.D., WILLIAM DALTON, M.D., ASHVIN ZUMKHWALA, M.D., ANDRES BELUAN, M.D., and LITO ALINO, M.D.

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO HAMILTON COUNTY

BRIEF OF RESPONDENTS IN OPPOSITION

STATEMENT OF THE CASE

Petitioners seek discretionary review by this Court of the unanimous decisions of the state courts below granting (or affirming) summary judgment in favor of Respondents. These

decisions resulted from a finding that Petitioners' Complaint for "breach of contract"[1] is preempted by federal law, particularly the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. § 1001 *et seq.* The Ohio courts also held that, when judged under the applicable federal common law of ERISA, Petitioners' claim of an oral agreement that contradicted the terms of Respondents' written ERISA plans could not survive summary judgment. Both the trial court and the Ohio First District Court of Appeals correctly ruled that ERISA "supercedes state common law or laws relating to employee benefit plans," (Petition, at 11a, Trial Court Decision), and "the breach of contract claim together with the claim against Scroggins is in connection with employee-benefit plans, and those claims are preempted insofar as they are grounded in the common law of Ohio." (Petition, at 5a, Court of Appeals Decision).[2] The Ohio Court of Appeals also affirmed that Petitioners had failed to establish a claim under ERISA. The Ohio Supreme Court denied discretionary review of the lower courts' decisions.[3]

On November 20, 1985, Petitioners filed their Complaint against Respondents Anesthesia Group Practice, Inc., all of its shareholders and its business consultant (Respondents will be collectively referred to herein as "AGP"). The rambling twenty-two page Complaint alleged that AGP failed to make contributions for several years to the corporation's ERISA pension and profit-sharing plans in accordance with alleged

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[1] Petition, at 18a (Complaint, ¶ 1: "This is an *action for breach of contract* by the employees of Anesthesia Group Practice, Inc. against their employer for failing to make contributions to the retirement fund. . . .") (emphasis added).

[2] Both decisions are included as appendices in the Petition and therefore have not been attached to this Brief in Opposition. Neither the trial court decision nor the intermediate Court of Appeals decision have been published in any Ohio case reporter.

[3] *See* 39 Ohio St. 3d 712 (1988) (motion to certify denied); 39 Ohio St. 731 (1988) (motion for rehearing denied).

oral statements to each Petitioner to contribute an amount equal to 25% of each such Petitioner's income to AGP's pension and profit-sharing plans.

Discovery demonstrated that even though Petitioners did sign written employment agreements, they made no claim based upon any written contract for pension or profit-sharing plan benefits in this case. Rather, the Complaint encompassed nine separate oral contracts (one for each Petitioner),[4] each claimed agreement directly contradicting the terms of AGP's written ERISA plans that have existed continuously since before the time that every one of the Petitioners was hired by AGP. The Complaint sought a judgment requiring additional contributions to the ERISA plans that greatly exceeded those specified in the plan documents.[5] While AGP denies Petitioners' allegation of the existence of oral contracts, resolution of this factual question was not material to the outcome in the trial court or on appeal (or before this Court) as Petitioners' claims are (i) preempted insofar as they are based on state law, and (ii) when judged under federal ERISA law, insufficient to survive summary judgment.

The Petition for a writ of certiorari is simply a rehash of the same arguments that have been rejected by each court hearing them on the merits, as well as by the Ohio Supreme Court, which has denied review on two occasions. Not a single new case has been cited to this Court to justify yet another appeal. The writ of certiorari should be denied for the reasons that:

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[4] After the trial court decision, AGP was informed that Plaintiff Susan Dolph no longer wanted to be part of the appeal and has dropped all claims against AGP. After the Ohio Supreme Court denied review, two other Plaintiffs, Richard Everett and Linda Fein, dropped out.

[5] Although the Complaint initially contained class-action allegations, Petitioners never moved to certify a class, and by their actions, have abandoned any class claims. No employee of AGP asked to join the action after its filing.

1. The plain wording of 29 U.S.C. § 1144(a) and numerous cases thereunder establish that ERISA preempts all claims based on state law relating to an ERISA plan, including the Petitioners' state law claims in this case;

2. Pursuant to the federal common law of ERISA as enunciated by the federal courts, particularly as stated in *Nachwalter* v. *Christie*, 611 F. Supp. 655 (S.D. Fla. 1985), *aff'd*, 805 F.2d 956 (11th Cir. 1986), alleged oral or informal written modifications that seek to contradict or vary the terms of an ERISA plan are not enforceable under ERISA;

3. There has been no merit review of this case by the Ohio Supreme Court, and there is no conflict between the decisions by the inferior Ohio courts in this case and any federal court of appeals or this Court; and

4. The decisions of the lower Ohio courts followed the Ohio Supreme Court's decision in *Richland Hospital, Inc.* v. *Ralyon*, 33 Ohio St. 3d 87, 516 N.E.2d 1236 (1987), which adopted controlling federal law on the subject of ERISA preemption and cited *Nachwalter*, *supra*, with approval.

Well established legal principles and precedents have been correctly applied by the Ohio trial and appeals courts below, and there is no reason for this Court to restate the principles of ERISA preemption when no conflict exists.

Supplement of Pertinent Facts

Because Petitioners attempt in their brief to ignore or mischaracterize factual findings of the Ohio courts, it is necessary to supplement the Statement of Facts. Petitioners were among the employees of AGP at times material to their claims. AGP set up a qualified ERISA pension plan and a qualified ERISA profit-sharing plan for all of its employees

prior to the employment of any Petitioner herein. The pension and profit-sharing plans were documented and filed in accordance with ERISA's "written agreement" requirement. 29 U.S.C. § 1102(a)(1) ("Every employee benefit plan shall be established and maintained pursuant to a written instrument"). The courts below found "[i]t is not disputed that AGP followed these formulae each year" and AGP funded the plans in complete compliance with the terms of the written plan documents. (Petition, at 4a, Court of Appeals Decision).

For the entire period relevant to the Complaint (1979-1984), the pension plan document contained the applicable formula, which stated that AGP's contributions would be 5% of the employee's salary up to the social security (FICA) wage limit, and 12% for everything above that limit. This formula was precisely followed in every year for every Petitioner (as well as for every other AGP employee). The profit-sharing plan document stated that AGP retained full discretion to choose a funding level at the end of each fiscal year. (Petition, at 4a-5a n.2-3, Court of Appeals Decision). Discretionary contributions were made each year in the same percentage of income for *every* AGP employee, including Petitioners.[6]

Every year, AGP gave each Petitioner a separate financial statement showing the exact amount of contributions for his or her benefit to the pension plan and to the profit-sharing plan. For example, Petitioner Ronald Erb testified in discovery that he reviewed his annual statements each year, noted that the contributions were less than he thought he was

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[6] Petitioners would have this Court relitigate these facutal findings of the Ohio courts in stating that the provisions of the plans are "not inconsistent with the promised finding." (Petition, at 6). This Court should deny Petitioners' invitation. *See Norton Co.* v. *Department of Revenue*, 340 U.S. 534, 538 (1951) ("Of course, . . . we have the power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean that we will re-examine, as a court of first instance, findings of fact supported by substantial evidence").

orally "promised," discussed the matter on several occasions with other nurses and doctors, took no further action, "acquiesced," and went back to work for the next year. Thus, each Petitioner knew what he or she was receiving in the ERISA plans during any given year.

Petitioners also admit to receiving complete written financial statements showing plan contributions, to the penny, for each year of his or her employment at AGP, but each now claims that his or her employee benefit plan balances should be increased in accordance with alleged oral "promises" made by different hiring doctors in different years of initial employment interviews. They would have the courts ignore the written pension plans that contradict (and that actually govern) their claims, ignore the Summary Descriptions of the plans distributed over the years to each Petitioner that also contradict the alleged "oral promises," ignore the annual financial statements, ignore detailed financial analyses given to each Petitioner by a personal investment advisor made available to them at AGP's expense, ignore plan modification notices sent to each of them, and so on.

Petitioners contend that their ostrich-like approach to the facts regarding the funding of their ERISA plans and their perennial acquiescence in receiving plan benefits now entitles them to assert a claim for retroactively increased funding of the plans, as well as recovery of assumed past and future earnings. Although the foregoing recitation of facts is not centrally material to this attempted discretionary writ, it does serve at least one useful purpose: it clearly demonstrates why Congress and the federal courts have preempted the field in this area. It is exactly this type of dispute to which ERISA preemption is directed. Under established federal ERISA law, the written document controls, not each participant's version of an oral claim that the plan should be rewritten for one, some, or even all beneficiaries and judicially funded at levels higher than the plans provide and the yearly written reports confirm.

SUMMARY OF ARGUMENT

A. United States Supreme Court and lower court authorities are in universal agreement that federal preemption under ERISA is one of the most sweeping federal preemption sections ever passed by Congress. The applicable ERISA statute specifically preempts all state law, including common law, that "relates to" employee benefit plans. The "relates to" standard is to be given its common sense meaning and applied broadly.

B. The state law claims of Petitioners that seek to modify (by increasing greatly) the funding levels of the ERISA plans, and that are at variance with the express provisions of the plans followed precisely by AGP for each Petitioner, "relate to" those plans and in fact are central to them, as the Ohio courts have held. Numerous federal courts have held that these types of claims are therefore preempted by federal law—and no court has held to the contrary.

C. Under the federal common law of ERISA, which state courts are bound to apply, Petitioners' attempts to modify or contradict the written funding levels contained in the ERISA plans by alleged oral or informal written agreements could not survive summary judgment on the record before the lower Ohio courts. This result is consistent with the holdings of every circuit court of appeals that has addressed the issue. That the Tenth and Eleventh Circuits support this proposition demonstrates that the Ohio trial and intermediate courts properly applied federal common law in dismissing Petitioners' Complaint. Despite Petitioners' argument that the decisions in the instant case conflict with federal authority, quite the opposite is apparent upon even a cursory review of the federal cases.

As a result of the above, there is no reason for this Court to review the decision of Ohio's First District Court of Appeals.

ARGUMENT

A. It Is Well Settled That The Federal Law of ERISA Preempts All State Causes of Action Relating to Pension And Profit-Sharing Plans, Including Claims for Alleged Breach of Contract, Because ERISA's Express Statutory Preemption Provision Bars All State Law Claims That "Relate To" Employee Benefit Plans.

The haphazard review of cases in the Petition for a writ of certiorari, like Petitioners' briefs submitted to the Ohio courts, tries mightily to avoid the wording of the controlling legal standard in this case: ERISA's express preemption provision. Instead, Petitioners distract this Court from the clear ERISA provision by avoiding discussion of the statutory standard. The general preemption section of ERISA states as follows:

> Except [in circumstances not relevant here], the provisions of this title and title IV *shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan* described in section 4(a) [29 U.S.C. § 1003(a)] of this title and not exempt under section 4(b) [29 U.S.C. § 1003(b)] of this title. This section shall take effect on January 1, 1975.

29 U.S.C. § 1144(a) (emphasis added). As this Court has repeatedly instructed, the ERISA preemption section is "deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.' " *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 46 (1987) (quoting *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981)); *see also Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985) ("The preemption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements"). Nor, as this Court has emphasized, is preemption "limited to 'state laws specifically designed to affect employee benefit plans.' " *Pilot*

Life, 481 U.S. at 47-48 (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 98 (1983)). Rather, the phrase "relate to" must be "given its broad common-sense meaning, such that a state law 'relate[s] to' a benefit plan 'in the normal sense of the phrase, if it has a connection with or reference to such a plan.' " *Pilot Life*, 481 U.S. at 47 (quoting *Metropolitan Life*, 471 U.S. at 739, quoting *Shaw*, 463 U.S. at 96).

Taking their lead from this Court, lower federal courts and the Ohio Supreme Court agree that ERISA contains one of the most expansive federal preemption sections ever passed. *See, e.g., Holland* v. *Burlington Industries, Inc.*, 772 F.2d 1140, 1146 (4th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986) ("In ERISA, Congress made its intent known in what has been called 'the most sweeping federal preemption statute ever enacted by Congress' "); *Richland Hospital, Inc.* v. *Ralyon*, 33 Ohio St. 3d 87, 516 N.E.2d 1236 (1987). "The term 'State law' as used in ERISA's preemption provision includes all laws, decisions, rules, regulations, or other State action having the effect of law." 29 U.S.C. § 1144(c)(1). As both lower Ohio courts in this case correctly held, this includes state common law.[7]

Petitioners do not dispute that both the AGP pension plan and the AGP profit-sharing plan are employee benefit plans covered by ERISA. Thus, any state claims "relating to" these plans are preempted by federal law.[8]

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[7] This holding is consistent with the Ohio Supreme Court's decision in *Richland Hospital, Inc.* v. *Ralyon*, 33 Ohio St 3d 87, 91, 516 N.E.2d 1236, 1240 (1987), as well as federal authorities.

[8] This Court cited to Black's Law Dictionary in formulating the broad "relate to" standard of ERISA. "Relate. To stand in some relation; to have bearing or concern; to pertain; refer; to bring into association or connection with." *Shaw* v. *Delta Air Lines*, 463 U.S. at 98 n.16 (1983). This is the preemption standard that the Ohio courts properly applied to the facts of this case. Upon review of the cases, the only limitations on the foregoing standard are when there is no written plan involved or when the claim "relates to" an ERISA plan only in a manner where "any palpable effect" is "tenuous, remote, or peripheral."

ERISA preemption goes well beyond specific state regulation of retirement plans, contrary to Petitioners' argument. *See, e.g., Holland*, 772 F.2d at 1147 ("A broad reading of the phrase 'relates to' is consistent with the legislative history and policies behind ERISA. Congress rejected a narrower preemption provision that would have preempted only state laws dealing directly with ERISA plans").[9]

The Ohio Court of Appeals correctly applied the plain meaning of ERISA's preemption provision as stated in the federal cases and as adopted by the Ohio Supreme Court in *Richland Hospital, Inc.* v. *Ralyon*, 33 Ohio St. 3d 87, 516 N.E.2d 1236 (1987). In *Ralyon*, the plaintiffs claimed that their coverage under their ERISA medical plan was misrepresented to them by their employer, the plan's sponsor. The Ohio Supreme Court applied ERISA's broad preemption standard and dismissed all state law claims:

> A state common-law claim asserting express, willful and malicious misrepresentation against a self-insured employee benefit plan is pre-empted by ERISA.

Id. at 87, 516 N.E.2d at 1237 (Syllabus ¶5). In addition, the *Ralyon* court held that a contract theory of recovery likewise was barred by ERISA preemption. *Id.* at 92, 516 N.E.2d at 1242 ("Accordingly, the alternative contract rationale urged in support of the Ralyons' cause of action is pre-empted. The effect of pre-emption in this instance is to vacate the award of benefits because the award is based upon state law").

Because the Ohio lower courts recognized and properly applied the preemption standard used by this Court, the lower federal courts, and Ohio's Supreme Court, there is no reason to review the Ohio court's decision.

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[9] *See also Shaw* v. *Delta Airlines, Inc.*, 463 U.S. at 98 (1983) ("The Conference Committee rejected these provsions in favor of the present language, and indicated that the section's pre-emptive scope was as broad as its language"). The reason for this broad form of preemption is clear: it "enables both the employer and employee to look to one source for their obligations and expectations, thereby eliminating this very type of dispute." (Petition, at 10a, Trial Court Decision).

B. State Law Claims For Increased Funding Of Employee Benefit Plans "Relate To" Those Plans And Thus Are Preempted In Accordance With Controlling Federal Law.

The goal of Congress in enacting ERISA was to create a uniform body of federal law so as to replace the conflicting and inconsistent approaches taken by the states and their respective court systems. Thus, while state courts have concurrent jurisdiction over claims in this area, state courts are *bound* to apply federal interpretations of the federal common law of ERISA. *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41, 56 (1987) (stating that body of federal substantive law was to develop and determine rights under employee benefit plans); *Richland Hospital, Inc.* v. *Ralyon*, 33 Ohio St. 3d 87, 92, 516 N.E.2d 1236, 1241 (1987) ("This application of state law cannot stand under ERISA's pre-emption provisions").[10]

Petitioners are attempting to require funding of their individual ERISA employee benefit plans in accordance with alleged oral promises. Funding of the plans obviously "relates to" the plans for preemption purposes, as both Ohio courts held. It directly determines the level of benefits available to plan participants. Petitioners' state law claims are thus preempted by the plain wording of ERISA.

The preemption determination of the trial and intermediate Ohio courts is consistent with literally scores of federal cases, as well as the Ohio Supreme Court's decision in *Richland Hospital, Inc.* v. *Ralyon*, *supra*, each of which

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[10] *Accord Authier* v. *Ginsberg*, 757 F.2d 796, 802 (6th Cir.), *cert. denied*, 474 U.S. 888 (1985) (allowing remedies to turn upon state-court interpretation of ERISA is contrary to congressional intent); *Ogden* v. *Michigan Bell Telephone Co.*, 595 F. Supp. 961, 967 (E.D. Mich. 1984) (concurrent jurisdiction does not mean local law should be applied as the federal standard); *Northeast Department ILGWU Health and Welfare Fund* v. *Teamsters Local Union No. 299 Welfare Fund*, 764 F.2d 147, 158 (3d Cir. 1985) (federal common law supplies the rule of decision, and state courts are to apply it); *Hollenbeck* v. *Falstaff Brewing Corp.*, 605 F. Supp. 421, 429 (E.D. Mo. 1984), *aff'd*, 780 F.2d 20 (8th Cir. 1985) (uniform body of federal common law and federal rules of decision to control).

holds that ERISA preempts *all* state law claims that relate to the plans. *See, e.g., Holland*, 772 F.2d at 1147 ("Preemption applies to a state cause of action under common law as well, for the state breach of contract and estoppel claims pose the same potential as the statutory cause of action for conflicting employer obligations and variable standards of recovery. . . . ERISA and the policies underlying it require preemption").[11]

Contrary to Petitioners' assertion of a "direct conflict with decisions of other courts including federal courts of appeals of the Third, Ninth and Eleventh Circuits" (Petition, at 10), there is no such conflict at all. For example, in *Blau* v. *Del Monte Corp.*, 748 F.2d 1348 (9th Cir.), *cert. denied*, 474 U.S. 865 (1985), former employees sued their employer alleging, *inter alia*, violations of state common law. The trial court granted summary judgment to defendants on all state law causes of action in the complaint, stating as follows:

> Defendants moved for partial summary judgment on plaintiffs' state law claims based on ERISA preemption. The district court granted the motion, and the order dismissing the first, second, third, fourth, fifth and seventh causes of action was entered May 18, 1983. . . . The district court was correct in finding that ERISA preempted plaintiffs' state common law causes of action.

Id. at 1356. The Ninth Circuit in *Blau* affirmed dismissal of causes of action on "state common law theories of liability (breach of contract implied in fact; promissory estoppel; estoppel by conduct; fraud and deceit; and breach of contract)." *Id.*[12]

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[11] *Accord Lafferty* v. *Solar Turbines International*, 666 F.2d 408 (9th Cir. 1982) (state law breach of contract claim preempted); *Calhoun* v. *Falstaff Brewing Corp.*, 478 F. Supp. 357, 359 (E.D. Mo. 1979) ("Since this Severance Plan is within the coverage of ERISA, plaintiff's count alleging breach of contract will be dismissed").

[12] Petitioners impliedly concede that *Blau* is federal common law authority *contrary* to their argument on these supposed conflicts, as they do not

Even the Ninth Circuit case that Petitioners cite to this Court in fact *supports* ERISA preemption of their common law claims, rather than justifies this Court's granting certiorari. In *Scott* v. *Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985), the plaintiffs attempted to state a claim for a "Breach of Employment Agreement" relating to an ERISA plan:

> Plaintiffs alleged that Gulf 'expressly and impliedly promised, *orally* and in writing' to pay severance pay to plaintiffs upon their termination of their employment with Gulf, at a rate of two weeks salary for each year of employment with Gulf, but failed to do so.

Id. at 1501 (emphasis added).

The Ninth Circuit made short work of plaintiffs' argument that their state law claim was not preempted by ERISA:

> A. First Claim "Breach of Employment Agreement". Plaintiffs' First Claim asserts no more nor less than plaintiffs were denied benefits due them under the terms of an employee welfare benefit plan. The claim is therefore pre-empted by ERISA.

Id. at 1505. The *Scott* holding on ERISA preemption applies to the instant case with full force to preempt Petitioners' claims for alleged breaches of oral agreements to fund AGP's employee welfare benefit plans. Thus, Petitioners' citation to *Scott* as authority that employment contract claims should

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even cite this Ninth Circuit case to the Court. *See also Turner* v. *Retirement Plan of Marathon Oil Co.*, 659 F. Supp. 534, 541 (N.D. Ohio 1987) ("Clearly, plaintiff's common law contract actions for breach of an oral agreement, for recovery under promissory estoppel, and for detrimental reliance are preempted by ERISA"; summary judgment for defendants). Likewise, in *Ogden* v. *Michigan Bell Telephone Co.*, 571 F. Supp. 520, 521 (E.D. Mich. 1983) (again not cited by Petitioners), the court dismissed plaintiffs' common law causes of action for "equitable estoppel," "breach of employment contract," "breach of contract to retire," "promissory estoppel," "innocent misrepresentation," and "common law fraud." For preemption purposes, Petitioners' breach of contract action is no different than that in *Ogden*.

not be preempted under ERISA is patently inaccurate, as is the claimed "direct conflict" with the Ohio courts' decisions herein.[13]

Petitioners' reliance upon another Ninth Circuit decision in *California Hospital Association* v. *Henning*, 770 F.2d 856 (9th Cir. 1985), *cert. denied*, 477 U.S. 904 (1986), is also misplaced. Like several other cases cited by Petitioners, *Henning* has nothing to do with preemption of an alleged state law breach of contract claim. Rather, it involved a declaratory judgment regarding whether a United States Department of Labor regulation *excluding* certain vacation programs from the definition of "employee welfare benefit plan" was a valid regulation: "If the regulation is valid [the vacation programs] are not within ERISA and are not affected by ERISA's preemption provision. The sole question, therefore, is whether the regulation is valid." *Id.* at 858. The Ninth Circuit found that this *federal* regulation was valid and thus expressly excepted it from ERISA's coverage (including ERISA's preemption provision). The *Henning* decision, therefore, deals with an express federal exception to ERISA that, like the statutory exemption in *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724 (1985), is notably absent from this case.

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[13] The only claim the *Scott* court did not hold to be preempted was plaintiffs' claim that Gulf had tortiously interfered by preventing Thrifty, their new employer, from providing any welfare benefit plan to them in connection with their future employment. The court held that, as there was no benefit plan of any type in existence at Thrifty after the refinery sale, the claim of tortious interference did not relate to an existing plan covered by ERISA. Accordingly, this claim was not preempted. However, in so holding, the Ninth Circuit was careful to note that this claim "does *not* raise any issues concerning the matters regulated by ERISA, namely, the administration, reporting, disclosure, *funding*, vesting, and enforcement of benefit plans." 754 F.2d at 1505 (emphasis added). In sum, the *Scott* court held that all claims relating to Gulf's ERISA Plan, including plaintiffs' claim of oral or written promises on the part of Gulf, were specifically preempted by ERISA. *Id.* at 1501, 1505.

In a like manner, Petitioners' heavy reliance upon a "direct conflict" with the Third Circuit in *Murphy* v. *Heppenstall Co.*, 635 F.2d 233 (3d Cir. 1980), *cert. denied*, 454 U.S. 1142 (1982), misses the mark. Rather than authorizing Petitioners' state breach of contract claims to be asserted in an ERISA action, the *Murphy* court stated that state law did *not* control; instead, the federal common law of ERISA governed:

> *The employees' contract claim against the employer is not a state law claim.* Rather, their claim arises under both the federal common law of labor-management contracts, and the federal common law of pension plans. . . . Moreover, except for the explicitly exempted plans, ERISA wholly regulates and federalizes the pension field.

Id. at 237 (emphasis added). In this case, the federal common law of ERISA as stated by the Eleventh Circuit in *Nachwalter* v. *Christie*, 611 F. Supp. 655 (S.D. Fla. 1985), *aff'd*, 805 F.2d 956 (11th Cir. 1986), applies to render unenforceable Petitioners' oral modification claims, as the Ohio courts correctly held. Once again, while simply reading the Petition would lead one to believe *Murphy* was on point in their favor, a review of the opinion proves that it is directly contrary to Petitioners' position and is, in fact, supportive of AGP's position.[14]

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[14] Petitioners also cite several non-federal and non-Ohio state courts in their effort to distract this Court from the point at hand. Put simply, state court decisions from California or New York are *not* part of the governing federal common law of ERISA, and thus do not even constitute persuasive authority for Petitioners' burden in this Court. Moreover, Petitioners' reliance on these state cases is groundless for additional reasons as well. For example, in *Sasso* v. *Vachris*, 66 N.Y.2d 28, 484 N.E.2d 1359 (1985), the New York Court of Appeals held that a section of New York's corporation law allowing collection of corporate debts from shareholders was not preempted by ERISA, although it recognized this Court's ruling that "the phrase 'relates to' found in Section 514(a) of ERISA must be interpreted broadly as its plain language indicates." *Id.* 484 N.E. 2d at 1361. However, the court found no preemption of the state statute because, "[i]f the statute

Petitioners' reference to alleged conflicts does not weaken the inescapable conclusion that their claims "relate to" (in fact, go to the heart of) AGP's plans and thus are preempted by federal law.[15] Despite Petitioners' long-winded efforts to distract attention away from it, the primary legal question before the Ohio courts was a narrow one: Does ERISA preempt claims for breach of oral contracts to fund ERISA welfare benefit plans? The answer to this question was an equally direct "yes," as both Ohio courts found. Because this determination is consistent with the many ERISA cases decided by this Court, as well as numerous lower federal court decisions, there is no substantial issue for this Court to review.

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has any palpable effect on the plan, it is the type of tenuous, remote, or peripheral effect that ERISA was not meant to preempt." *Id.* 484 N.E.2d at 1362. Unlike the instant action, *Sasso* did not deal with a state breach of contract claim or any other common law claim pressed to secure increased funding of an ERISA plan. The plaintiffs in *Sasso* alleged no oral agreements relating to the funding of an ERISA plan, which claim would obviously have more than a "tenuous, remote, or peripheral" impact on an ERISA plan. Furthermore, even New York state's courts recognize the rule in *Nachwalter*. *See Pirrelli* v. *Schiavone Construction Co.*, 529 N.Y.S.2d 2, 3 (App. Div. 1988) ("Moreover, even if the Statute of Frauds does not apply, an oral agreement which modifies written employee benefit plans governed by the Employee Retirement Income Security Act of 1974 . . . is illegal and unenforceable (see, *Nachwalter* v. *Christie*)").

[15] Unlike the instant case, the decision in *Martori Brothers Distributors* v. *James-Massengale*, 781 F.2d 1349 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986), which is highlighted in the Petition, falls into that line of cases where the effect of the regulation on the retirement plan is "too tenuous, remote, or peripheral" to be considered to "relate to" an ERISA plan. This limited exception to ERISA's broad preemption has no application here as Petitioners' claims go to the very heart of AGP's plans: their funding levels.

C. Under the Governing Federal Common Law Of ERISA, Alleged Oral or Informal Written Agreements That Attempt To Vary The Terms of Written ERISA Plans Are Not Enforceable.

Consistent with their obligation (as acknowledged in *Richland Hospital, Inc.* v. *Ralyon*, 33 Ohio St. 3d 87, 516 N.E.2d 1236 (1987)) to apply the governing federal law of ERISA, the Ohio courts held that the Petitioners' claims of breach of an oral or informal contract that contradicted AGP's written ERISA plans could not survive summary judgment. *See Nachwalter* v. *Christie*, 611 F. Supp. 655, 661 (S.D. Fla. 1985), *aff'd*, 805 F.2d 956 (11th Cir. 1986) ("The requirement that pension and profit-sharing plans be established and maintained pursuant to a written agreement precludes the alteration of a plan pursuant to an oral agreement").

In *Nachwalter*, the trial court confronted allegations similar to the instant case; namely, that the trustees of an ERISA plan reached an alleged *oral* or *informal agreement* with a plan beneficiary-employee to value his account balance and to render lump-sum payments to the beneficiary. This alleged oral promise was contrary to the terms of the written plan instrument. The court rejected the argument that the alleged oral agreement was of any legal effect:

> An oral agreement cannot be the basis of a cause of action under ERISA due to the fact that such an oral agreement would be contrary to the express provisions of ERISA. . . .
>
> This express requirement of a written agreement is inconsistent with defendant's attempt to prove a legally enforceable oral agreement.

611 F. Supp. at 661.

In its opinion affirming the district court, the Eleventh Circuit first squarely framed the federal common law issue: "The main issue on appeal is whether written employee benefit

plans governed by ERISA may be modified by oral agreements." 805 F.2d at 959. The court of appeals then directly held that oral modifications to a written ERISA plan were not enforceable:

> We agree with the district court that this requirement that ERISA plans be 'maintained' in writing precludes oral modifications of the Plans; the common law doctrine of estoppel cannot be used to alter this result.

805 F.2d at 960. The court further affirmed that even informal *written* modifications were unenforceable:

> The conclusion that under ERISA oral modifications of employee benefit plans are impermissible is buttressed by the observation that Congress expressly prohibited informal written amendments of ERISA plans.

805 F.2d at 960.

The Tenth Circuit has also followed *Nachwalter* in *Straub* v. *Western Union Telegraph Co.*, 851 F.2d 1262 (10th Cir. 1988), by holding that an employee's claims against his former employer for breach of contract and negligent misrepresentation were preempted by ERISA:

> Following the lead of the Eleventh Circuit, we hold that no liability exists under ERISA for purported oral modifications of the terms of an employee benefit plan.

Id. at 1265. As in the instant case, the employee in *Straub* received benefits according to the express terms of the written plan. *Id.* at 1266 ("Because Straub is receiving the benefits to which he is entitled under the express terms of defendant's employee benefit plan, he has no cause of action under ERISA").

It is undisputed — and has been found as a matter of fact in the instant case by the Ohio courts — that Petitioners' plans were funded in strict accordance with the written ERISA plans. (Petition, at 8a, Court of Appeals Decision).

The courts below further found that Petitioners' claimed oral modification of the written plans is contrary to the plan documents themselves. (Petition, at 11a, Trial Court Decision) ("The manner, in which the alleged agreements altering the funding levels of the benefit plans were made, is not in accord with Article VIII of either the AGP Pension or Profit-Sharing Retirement Plans"). As a result, the lower Ohio courts correctly applied the above federal decisions in holding that Petitioners were not free to contradict their ERISA plans through claims of oral modification.

Additional federal common law support for the lower courts' decision can also be gleaned from cases interpreting the Labor Management Relations Act (LMRA). Reviewing courts have held that ERISA and LMRA contain many similar provisions and that consistent interpretation of the similar provisions is warranted. *Jung* v. *FMC Corp.*, 755 F.2d 708 (9th Cir. 1985); *Nachwalter* v. *Christie*, *supra*; *Straub* v. *Western Union Telegraph Co.*, *supra*; *Hugh* v. *Overly*, 445 F. Supp. 946 (W.D. Pa. 1978); H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 5038, 5107.

The LMRA, like ERISA, precludes alteration of written plans by oral agreement. *See San Pedro Fishermen's Welfare Trust Fund* v. *DiBernardo*, 664 F.2d 1344 (9th Cir. 1982); *Reiherzer* v. *Shannon*, 581 F.2d 1266 (7th Cir. 1978); *Lewis* v. *Seanor Coal Co.*, 382 F.2d 437 (3rd Cir. 1967), *cert. denied*, 390 U.S. 947 (1968); *Hugh* v. *Overly*, *supra*; *Mo-Kan Teamsters Pension Fund* v. *Creason*, 716 F.2d 772 (10th Cir. 1983), *cert. denied*, 464 U.S. 1045 (1984).

The federal common law rationale for voiding oral statements in favor of the original express agreement was explained in *San Pedro*:

> Oral statements regarding the meaning of a written trust fund agreement are difficult to prove and judicial recognition of some oral statement may invite collusion and controversy to the detriment of the beneficiaries.

Id. at 1345.[16] Similarly, federal law here prevented Petitioners from rewriting the terms of AGP's retirement plans to suit their own needs. Those written terms, consistent with ERISA, must be applied in a nondiscriminatory fashion to all eligible participants.[17]

Finally, the Ohio Supreme Court in *Richland Hospital, Inc.* v. *Ralyon*, 33 Ohio St. 3d 87, 92 n.10, 516 N.E.2d 1236, 1242 n.10 (1987), cited with approval to *Nachwalter* v. *Christie*, *supra*, as part of the "developing federal common law of ERISA," and noted that the "federal courts have refused to apply common-law theories of oral modification." In *Ralyon*, after the Court dismissed state law misrepresentation and breach of contract claims as preempted, it remanded the case to the trial court to consider the impact of the federal law of ERISA (including *Nachwalter*) because that question had not been considered by the lower court. *Id.* at 93, 516 N.E.2d at 1242. In applying the federal law of ERISA to Petitioners' claims, the lower Ohio courts relied in part upon the *Nachwalter* case in holding for AGP. In sum, the trial court

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[16] The Court in *Lewis* v. *Seanor Coal Co.* stated as follows:

> [Oral agreements] would expose employer and union representatives alike to the temptations of corrupt bargains, for it would permit the union to extract from an employer a secret promise to pay some other amount into the fund without requiring such payments to become a matter of record and thus would frustrate the purpose of § 302(c)(5). Moreover, the employees have a right to know if the obligation to make the payments into the fund is modified; otherwise they might be led to remain at their jobs in reliance on the benefits which the formal agreement has promised, after they have been eroded by oral modification of the obligation to make the payments supporting such benefits.

Lewis, 382 F.2d at 443.

[17] Petitioners consist of of only 7 out of more than 30 eligible participants in the plans. That Petitioners' individual claims regarding oral promises cannot be allowed to influence other participants' funding levels further demonstrates why such claims of oral promises are unenforceable under ERISA.

and the intermediate court followed precisely the analysis mandated by the Ohio Supreme Court in the *Ralyon* decision.[18] The combination of the federal courts' decisions and the *Ralyon* decision provides all the precedent needed to support the decisions of the courts below.

It is also worthy of note that the instant case stands as a very clear example of why Congress preempted the field in the case of existing written ERISA plans. When an employer, such as AGP, has a qualified written plan that clearly provides funding and benefit levels for each participant therein, maverick claims by some of the participants, such as Petitioners (7 of over 30 eligible participants), that are based upon supposed oral statements contradicting the terms of the plan itself cannot proceed in light of ERISA. To rule otherwise would allow any beneficiary to attempt to prove his own peculiar claim for special funding or benefits under the plan in a manner that, if successful, would deplete the remaining funds for other participants. This is exactly the type of result ERISA was intended to prevent.

As a result, the Ohio lower courts correctly applied controlling federal law in entering summary judgment on Petitioners' claims of breach of oral contract seeking to modify AGP's ERISA plans. Because the Ohio lower courts correctly applied controlling federal law, there is no reason for this Court to review the Ohio appellate court's decision.

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[18] In a futile attempt to avoid the mandate of *Nachwalter* and *Ralyon*, Petitioners cite to *Northwest Administrators, Inc.* v. *B.V. & B.R., Inc.*, 813 F.2d 223 (9th Cir. 1987). Unlike the situation here, that case dealt with an attempt to explain an ambiguous word in an ERISA contract, *not* an attempt to vary or add to its terms. Further, the court in *Northwest Administrators* adopted and cited with approval the rule in *Nachwalter*. *Id.* at 226-27 ("[A]n oral agreement or tacit understanding between Mid-Valley and the union that conflicts with or alters the meaning of the written agreement should not be considered"). Thus, *Northwest Administrators* is no authority for Petitoners' efforts to vary the terms of the written plan documents in this case.

CONCLUSION

Despite Petitioners' rhetoric, it was (and is) beyond genuine dispute that their claims seeking to compel higher levels of contributions to their individually directed pension and profit-sharing plan accounts (which contributions determine benefits) do "relate to" AGP's pension and profit-sharing plans. Under the clear wording of 29 U.S.C. § 1144(a), Petitioners' state law claims are therefore specifically preempted in favor of ERISA standards. When judged under federal ERISA standards, Petitioners' claims for breach of oral (or informal written) promises are barred as a matter of law. *Nachwalter* v. *Christie*, *supra*; *Richland Hospital, Inc.* v. *Ralyon*, *supra*.

By drawing attention away from the precise legal standard to be applied, and by alleging conflicts that do not in fact exist, Petitioners would have this Court accept this case and then rule that their effort to compel a change in funding of their ERISA plans does not "relate" in any way to these plans. Such a request borders on absurd as the funding of a plan goes to the very core of an employer's obligations thereunder, as well as the benefits to be derived therefrom by employees. In short, funding levels (provided for in a plan itself) obviously "relate to" the plan.

For these reasons, this Court should deny the requested writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Brief of Respondents Opposing Jurisdiction upon Joseph R. Jordan, Counsel of Record for Petitioners, 2008 Carew Tower, Cincinnati, Ohio 45202, this 27th day of February, 1989.

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John J. McCoy